Constitutional Limitations on Prosecutorial Discovery

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The prosecution has a legitimate interest in discovering all relevant facts to present the strongest possible case at trial and to meet the defendant's case. Despite that interest, in most jurisdictions the prosecution may discover only the evidence which the defendant intends to present at trial. Even such limited discovery has been the subject of sharp constitutional attack. The author argues that far broader prosecutorial discovery is constitutionally permissible. The prosecution should be able to discover all relevant facts useful in testing defense evidence and any documents or tangible things (for example, the murder weapon) which strengthen the prosecution's case if the prosecution could have obtained them by seizure if it only knew their location.

PROSECUTORIAL DISCOVERY: LEGITIMACY AND LIMITATIONS

Discovery is a stage in a lawsuit. It normally occurs between the initial pleadings and the trial or settlement of a case. Discovery may, however, continue at trial itself. The purpose of discovery is to afford parties access to all relevant, unprivileged information. It further the ascertainment of truth by permitting a party to obtain two distinct types of information: information that may provide evidence in support of claims or defenses and information on the claims or

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1. Discovery occurs at trial when the court orders a party to disclose information which the party does not wish to offer into evidence. United States v. Nobles, 422 U.S. 225, 234-36 (1975) (court ordered defendant to produce at trial prior statement of defense witness).
defenses which an opponent plans to present at trial. The former type of discovery permits a party to strengthen its case for trial or settlement purposes, while the latter type of discovery permits a party to prepare to meet its adversary's case. Both types of discovery are designed to further the accurate and efficient disposition of lawsuits.

In civil litigation, absent some claim of privilege, the parties have no valid interest in denying each other access to facts that can throw light on the issues in the case. Discovery is particularly important to private litigants because, prior to the discovery stage of litigation, they have no means to compel the cooperation of persons who have knowledge of relevant facts or who possess relevant documents or things. For this reason, private litigants are unlikely to obtain complete information on the strength of their own case or that of their opponent until after discovery is obtained. Court rules nevertheless require a party, or the attorney acting on the party's behalf, to have a good faith belief in the validity of any claim or defense advanced when filing a pleading. A party must therefore conduct a reasonable inquiry to ascertain the facts before commencing a lawsuit or filing a defensive pleading. There are, however, severe practical limitations on the investigatory powers of private persons who lack access to compulsory process. Only the availability of discovery permits private parties to gather the information needed to plan intelligently for trial or settlement.

Do similar considerations favor broad discovery in criminal cases? Until recently the answer normally given was no. At one time, formal discovery was unavailable in criminal cases because the prosecution had no need for it and because criminal defendants who did need it were not sufficiently trustworthy to receive it. Thus, the prosecution gathered its evidence through search and seizure, police interrogation, and grand jury subpoenas, while the defendant remained in the dark about the prosecution's case until trial. If the defendant learned before trial the evidence to be introduced by the prosecution, judges feared that the defendant would present perjured defenses or intimidate prosecution witnesses. Moreover, the other rights of criminal defendants already tipped the scales of justice too far in the defendant's favor; and the availability of formal discovery tools would permit the defendant to further obstruct the prosecution's difficult task of convicting the guilty.

3. For example, see Chief Justice Vanderbilt's classic attack on discovery by the criminal defendant in State v. Tune, 13 N.J. 203, 210-11, 98 A.2d 881, 884-85 (1953).
4. See United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1924) (defendant's motion to inspect grand jury minutes denied). According to Judge Hand:

While the prosecution is held rigidly to the charge, [the accused] need not
Fear of these abuses still affects the availability of defense discovery in some jurisdictions. In the federal courts, for example, the criminal defendant now obtains from the government discovery of those documents, tangible objects, and reports of experts which the government intends to use as evidence or which are material to the preparation of the defense. However, the criminal defendant cannot learn until trial the identity of government witnesses and the substance of their expected testimony. Moreover, a criminal defendant may never learn the identity of persons known to the government to have knowledge of relevant facts if the government decides not to call them as witnesses. In 1974 the Supreme Court submitted to Congress a revised discovery rule which required the government to make pretrial disclosure of the names, addresses, and criminal records of its witnesses, subject to the trial court's authority to issue a protective order to limit or bar such discovery for good cause. Congress, largely at the behest of concerned federal prosecutors, omitted that provision from the rule it adopted by statute.

The majority of the states, on the other hand, now extend the benefits of both documentary and witness discovery to criminal defendants. This change in large part is attributable to the influence of disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

For rebuttal, see Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 YALE L.J. 1149 (1960). At least one commentator believes that the balance of advantage in some states (e.g., California) is now on the defendant's side. Van Kessel, Prosecutorial Discovery and the Privilege Against Self-Incrimination: Accommodation or Capitulation, 4 HASTINGS CONST. L.Q. 855, 899-900 (1977).

5. FED. R. CRIM. P. 16.
7. Of course, due process may require the government to disclose exculpatory evidence, but the government may not believe the undisclosed witness' testimony to be exculpatory and the defense may therefore never become aware of what the government did not disclose. The Supreme Court has also interpreted quite narrowly the government's disclosure obligations in United States v. Bagley, 105 S. Ct. 3375 (1985), discussed infra in text accompanying notes 48-50.
11. Roughly 40 states have adopted statutes or court rules providing for defense discovery, while a handful of others afford criminal defendants common-law discovery. 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 19.3(b) (1985). Roughly one-half of
the American Bar Association's (ABA) Standards on Discovery and Procedure Before Trial (Standards on Discovery), which recommend the full and free discovery of unprivileged information by criminal defendants. The drafters of these Standards, whose work the ABA approved first in 1970 and then in slightly revised form in 1978, argue that the danger of defense abuse of discovery is present only in a limited number of cases and that the courts should manage this danger by enforcing higher standards of attorney conduct and through protective orders entered on a case-by-case basis. In all cases where the prosecution does not obtain a protective order, the defendant should be able to discover before trial, not only any exculpatory evidence that the federal constitution requires the prosecution to disclose, but also evidence of defendant's guilt gathered by the prosecution.

Despite the liberality of the ABA's approach, the Standards on Discovery and statutes and court rules based on them still treat defense discovery — and prosecutorial discovery as well, as will be seen — as basically an interparty affair (that is, an exchange of information between the prosecution and the defense). There is very little, if any, opportunity for discovery from third parties or through deposition of persons with knowledge of the facts. Discovery in criminal cases, therefore, functions differently and less generously than discovery in civil cases. The need to bring criminal defendants speedily to trial precludes the involvement of nonparties in discovery and the development of the leisurely deposition practice so common in civil cases.

The growing availability of defense discovery naturally raises the question of the desirability of prosecutorial discovery. If the defendant has access through discovery to relevant, unprivileged information known to the prosecution, should not the prosecution also have access to relevant, unprivileged information known to the defendant? In other words, should not criminal discovery be a two-way street? The prosecution is a party to the litigation and therefore has an in-

12. For the present version of these Standards, see 2 Standards for Criminal Justice, ch. 11 (2d ed. 1980). The Standards originally appeared as Standards Relating to Discovery and Procedure Before Trial (Approved Draft 1970).

13. 2 Standards for Criminal Justice Standard 11-1.1(b), at 11-12 (2d ed. 1980) (commentary on 1978 revision). For more extensive commentary accompanying the original Standards, see Standards Relating to Discovery and Procedure Before Trial § 1.2(a) (Approved Draft 1970).


terest in learning the relevant facts to prepare for trial. The defendant cannot insist that the prosecution not question or subpoena a person with knowledge of facts on the ground that the person is a witness for the defense.17 Formal discovery thus furthers the prosecution's legitimate interest in obtaining access to all relevant, unprivileged information.

The ABA and the majority of the states recognize the appropriateness of prosecutorial discovery, but have been far more cautious in implementing it than in implementing defense discovery. Though the ABA initially approved prosecutorial discovery of all defense witnesses,18 it subsequently retreated to recommend discovery only of alibi or mental health witnesses.19 In those areas the prosecution has a special need to obtain discovery in advance of trial in order to investigate potentially fabricated defenses. A majority of the states now require a defendant to give advance notice and to provide discovery if the defendant intends to introduce alibi evidence or to raise insanity or a related defense.20 However, only fifteen states require defendants to disclose prior to trial all defense witnesses, and only ten states require defendants to identify or provide discovery on other defenses which they intend to raise at trial.21

The Standards on Discovery and the statutes and rules implementing them view discovery primarily as a means to make criminal trials fairer and shorter through the avoidance of surprise. As will be seen more fully below, the emphasis is on the defendant's and, to a lesser extent, the prosecution's pretrial discovery of the opposing party's case. The defendant obtains discovery of relevant information that the prosecution does not intend to use at trial only under the prosecutor's due process obligation to disclose material or information which tends to negate the defendant's guilt or to reduce punishment.22 The prosecution, on the other hand, obtains no discovery of

17. Thus, defense counsel cannot instruct defense witnesses not to talk with the prosecutor or investigators acting on the prosecutor's behalf. See Van Kessel, Prosecutorial Discovery and the Privilege Against Self-Incrimination: Accommodation or Capitulation, 4 Hastings Const. L.Q. 855, 887 n.134 (1977) (criticizing as unprecedented a California Supreme Court decision hinting to the contrary).
19. 2 Standards for Criminal Justice Standard 11-3.3 (2d ed. 1980).
20. 2 W. LaFave & J. Israel, supra note 11, at § 19.4(b)-(c).
21. See id. § 19.4(e)-(f).
22. For the scope of defense discovery, see 2 Standards for Criminal Justice Standard 11-2.1(c) (2d ed. 1980), and Standards Relating to Discovery and Procedure Before Trial § 2.1(c) (Approved Draft 1970). On the inadequacy of relying upon the prosecutor's constitutional obligation to disclose exculpatory evidence as a basis
information that the defendant does not intend to offer as evidence at trial. This approach thus ignores, or at least deemphasizes, one of the principal advantages of discovery (that is, the greater accuracy in fact-finding achievable through affording the parties access to all relevant information).

The most serious nonconstitutional objection to prosecutorial discovery is that the prosecution does not need it. Unlike private litigants, the state may enforce its informational demands prior to the commencement of litigation. Indeed, the state should complete its investigation of a crime before it formally charges the defendant. The prosecution should not seek a grand jury indictment or file a criminal information unless convinced that sufficient evidence of guilt is available to put the defendant on trial. Search warrants, grand jury subpoenas, and the coercive powers of the police to search and seize without a warrant provide the prosecution with the necessary tools to obtain such evidence.

There are, however, two answers that overcome this objection to prosecutorial discovery. First, the prosecutor still needs to be aware of all evidence the defendant intends to present at trial in the way of defense. Even the most thorough investigation will not uncover everything known to the defendant or everything the defendant might present at trial. This prosecutorial ignorance is in part attributable to the privilege against self-incrimination which sharply limits the questioning of suspects at the precharge stage and curtails subpoenaing suspects for documents or tangible things. Absent pretrial discovery of the defendant’s evidence, the prosecution faces the danger of surprise at trial.

Second, there is no constitutional bar to the prosecution’s strengthening its case subsequent to bringing a formal charge against a suspect. At trial, the prosecution must prove all elements of the offense charged beyond a reasonable doubt. At the earlier stage of the grand jury indictment or the preliminary hearing — required in most jurisdictions permitting prosecutions by information

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23. If the suspect is in custody, law enforcement authorities must observe the Miranda litany of warnings and waivers before questioning him. Miranda v. Arizona, 384 U.S. 436 (1966). In noncustodial situations, there are no similar per se requirements, but the authorities are well advised to warn suspects (potential defendants) of their right not to speak to ensure the voluntariness of any incriminating statement. Beckwith v. United States, 425 U.S. 341, 347-48 (1976). It is accepted practice (perhaps constitutionally required) to warn a potential defendant subpoenaed to testify before a grand jury. United States v. Washington, 431 U.S. 181 (1977).

— the applicable standard is only probable cause or that of a prima facie case. Perhaps we should make such screening devices more rigorous and require the prosecution to be ready to go to trial once charges are brought, but there should be no absolute bar to post-charge discovery efforts by the state to strengthen its case.

In short, postcharge investigation is appropriate for a number of reasons. The announcement of charges may prompt further disclosures by individuals with knowledge of the facts, or may prompt disclosures by persons who did not come forward prior to the filing of charges. In addition, the prosecution may find it necessary to expand its case after learning what the defendant plans to present at trial. The postcharge investigations which pose the most serious threat to the defendant's right to a fair trial are those investigations which take place outside the formal discovery process and without the knowledge of the defense. If the prosecution seeks additional information through a formal discovery request, the defendant at least has the opportunity to consult with counsel and to raise in court any claim of privilege.

Prosecutorial discovery therefore has its own legitimacy. The prosecution, like any other litigant, should be able through discovery to strengthen its own case and to learn its opponent's case. This Article largely assumes the desirability of prosecutorial discovery. Rather than review further the case for or against prosecutorial discovery, this Article seeks to analyze the constitutional limitations to which such investigations are subject. These limitations derive primarily from the privilege against self-incrimination and from the state's obligation to furnish the defendant due process of law. Some courts have also found limitations on discovery in the defendant's right to the effective assistance of counsel, but the basis for such a limitation is questionable. The attorney-client privilege and the work product privilege may also limit discovery in particular cases; but those privileges, unlike the privilege against self-incrimination, do not have a constitutional basis and are thus subject to modification in the discovery context by statutes or court rules.

27. The existence of a constitutional basis for the attorney-client privilege is a subject of dispute, but courts have so far declined to constitutionalize the privilege. See cases cited infra note 244. It is clear that surreptitious intrusions by the prosecution on a
At first glance the privilege against self-incrimination does not appear to provide an insurmountable obstacle to prosecutorial discovery. The privilege has received in recent years an increasingly narrow interpretation by the Supreme Court. The Court no longer seeks to identify the many "values" or "policies" behind the privilege,\(^\text{28}\) but applies it in a more formalistic fashion which, as the Court itself has recognized, makes the "scope of the privilege" less than "the complex of values it helps to protect."\(^\text{29}\) To establish a valid claim of privilege, the person invoking the privilege must establish that the disclosures sought by the state satisfy the famous Schmerber v. California\(^\text{30}\) trilogy: those disclosures must be compelled, testimonial, and incriminating. If anyone of the three prongs is missing, there is no valid claim of privilege.

The Schmerber Court itself held that the compelled production of a potentially incriminating blood sample did not violate the privilege because the production was not "testimonial." In two later cases involving prosecutorial discovery, the Court rejected the defendant's claim of privilege because one of the elements of the Schmerber trilogy was missing. In Williams v. Florida,\(^\text{31}\) the Court upheld prosecutorial discovery prior to trial of the names and addresses of alibi witnesses the defendant intended to call at trial. The Court reasoned that Florida's notice of alibi rule did not "compel" any disclosures by the defendant but merely accelerated the timing of the disclosures the defendant intended to make at trial. In United States v. Nobles,\(^\text{32}\) an unanimous Court upheld prosecutorial discovery of the prior statement of a defense witness on the ground that the charged defendant's confidential communications with counsel violate the defendant's constitutional right to counsel if the prosecution uses the information obtained to the defendant's detriment at trial. See Weatherford v. Bursey, 429 U.S. 545 (1977). But it is hard to see how there is a violation of the right to counsel if both the defendant and the attorney realize in advance that certain communications between them are no longer privileged. "[O]ne can imagine a fair legal system requiring attorneys to disclose in the courtroom confidential communications imparted by their clients." Saltzburg, Privileges and Professionals: Lawyers and Psychiatrists, 66 VA. L. REV. 597, 603 n.14 (1980). In such a legal system, defendants could receive effective legal assistance even though they might be less candid in making disclosures to their attorneys. For a contrary argument, see Note, The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement, 91 HARV. L. REV. 464, 485-87 (1977) (unconstitutional to require defendants to incriminate themselves to obtain the assistance of counsel).


For example, see Justice Goldberg's well-known effort to identify at least seven "policies" behind the privilege in Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964).

Pelled disclosure did not require any testimony by the defendant. While *Nobles* involved discovery of the witness' prior statement after the witness testified at trial, the reasoning of the Court is equally applicable to pretrial discovery of prior statements of the witnesses the defendant intends to call at trial. In both situations, the privilege is "personal to the defendant" and "does not extend to the testimony or statements of third parties called as witnesses at trial." 33

The present Court's formalistic interpretation of the privilege also reshapes, to the advantage of the prosecution, the privilege available to individuals served with a grand jury or other investigatory subpoena for the production of documents. In a series of cases culminating in *Fisher v. United States*, 34 the Court has rejected the traditional approach, derived from *Boyd v. United States*, 35 which allows a witness to base a claim of privilege on the incriminating contents of subpoenaed private papers. The witness must now establish that the compelled act of production, as distinct from the contents of the papers, is both testimonial and incriminating. This doctrine of testimonial production, grudgingly accepted by Wigmore and other evidence scholars, 36 affords the witness less protection than the Court's traditional approach. The testimony which may accompany the act of production, and thus afford a possible basis for a claim of privilege, are the producer's implied statements that the documents produced exist, are in the producer's possession, and are the documents demanded (that is, they are authentic).

These implied statements seemingly accompany every act of production, but *Fisher* reached the remarkable conclusion that they are not "sufficiently" testimonial if the prosecution does not need the producer's testimony. The witness has no claim of privilege if the prosecution can authenticate the documents by other means and if the existence and location of the documents are "foregone conclusions." 37 Thus, where the act of production "adds little or nothing to the sum total of the Government's information," 38 the prosecution may obtain access to the incriminating contents of the witness' private papers, which may of course add a great deal to what it knows.

Even if the witness satisfies the testimonial prong, *Fisher* also requires that the witness establish that the act of production is incrimi-

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33. *Id.* at 234.
35. 116 U.S. 616 (1886).
37. 425 U.S. at 411.
38. *Id.*
nating. It is not enough that the contents of the papers incriminate the witness; the witness must establish that the fact of their "existence" or the witness' "possession" of them poses "a realistic threat of incrimination."^{39} Not surprisingly, these elusive criteria have proved difficult to apply. Only two things are certain: private papers no longer receive any greater protection from subpoenas than do chattels such as a gun, and nonproduction is necessarily privileged only in cases where the possession of the item sought is itself a crime.^{40} It otherwise remains unclear how far the doctrine of testimonial production protects an ordinary witness or a criminal defendant from compelled disclosures.

There is, however, a further, potentially more substantial limitation on prosecutorial discovery which derives from the fact that the state is a very special litigant. When the prosecution invokes the criminal process to punish an individual, it is not just an ordinary adversary or party opponent, but it represents the state and is asserting the power of the people to punish individuals for their offenses. In this situation, the courts have a special responsibility to maintain a fair state-individual balance and to insure that prosecutorial discovery does not unfairly skew the criminal process in favor of the state. Any such fundamental unfairness would violate due process.

This concern for fairness also underlies the traditional policies advanced to justify the privilege. Although the policy underpinning of the privilege is anything but clear, it is possible to group most of the arguments advanced in its support under two principal headings: the maintenance of a fair state-individual balance in the criminal process and the protection of human dignity.^{41} The first heading (deprecatingly labeled by Bentham as the "fox hunter's reason")^{42} treats the privilege as an instrument for ensuring that the state and the defendant remain relatively equal adversaries. The state must leave individuals alone until it has good cause to disturb them and then cannot conscript individuals to defeat themselves. Under this instrumental approach, the scope of the privilege (that is, what constitutes compulsion) may differ from one setting to another and from one time to another.^{43} The courts must give society as much a dose of the privi-
lege as it needs.

The second heading (labeled by Bentham the "old woman's reason") is more normative and absolutist. This policy recognizes that it is contrary to human dignity to impose certain choices on individuals. Compelling persons to choose between deceiving their interrogator, going to jail for their silence, or going to jail for their testimony, is unfair to the individual. Compelling such a choice is also, as emphasized by the first reason, destructive of the adversary system. Coercion produces either false testimony or steamrolled defendants.

The two policies supporting the privilege are thus complimentary. The Court, whenever it chooses to rely on the policies behind the privilege, seems to invoke the need to preserve "an adversary system of criminal justice." 44

The courts have so far found little occasion or need to identify more specific due process limitations on prosecutorial discovery. The Supreme Court has done no more than to require that criminal discovery be reciprocal. 45 Thus, to obtain discovery from the defendant, the prosecution must afford the defendant reciprocal discovery; but the Court has done almost nothing to define what it means by reciprocity. In the only case in which it addressed the issue, the Court merely held that the prosecution could not obtain discovery of the defendant's alibi witnesses unless it furnished discovery of its alibi rebuttal witnesses. 46 It remains unclear, even in the context of the discovery of alibi witnesses, what reciprocal discovery the prosecution must provide of its own case or of relevant information potentially helpful to the defense.

The scope of the reciprocal discovery available to the defendant is important for at least two reasons. First, the special interparty nature of criminal discovery requires the defendant to rely exclusively on the prosecution for pretrial discovery. The defendant has no access prior to trial to compulsory process to force disclosures from third parties. The prosecution usually has pretrial access to third party information through grand jury or other investigatory subpoenas and by search and seizure. The defendant, on the other hand, can obtain access during discovery to information controlled by unknown or recalcitrant third parties only if the prosecution shares what it already knows.

44. 5 J. BENTHEM, supra note 42, at 230.
47. Id.
Second, defendants can no longer rely, if they ever could, on the prosecution's due process obligation to disclose exculpatory information to obtain all information useful in presenting a defense. The Supreme Court now formulates the prosecutor's obligation, not as one to disclose exculpatory material, but as an obligation to afford the defendant a fair trial. Suppression of evidence results in constitutional error only if the evidence is material in the sense that its suppression might have affected the outcome of the trial. Therefore, the defendant must rely on discovery rules to obtain not only advance notice of the prosecution's evidence, but also to learn what information the prosecution has in its file potentially helpful to present a defense.

For both these reasons it is critical to the defense to know what discovery is obtainable from the prosecution in return for providing discovery. The defendant should be permitted to discover, in exchange for the broad prosecutorial discovery contemplated in this Article, more than what the prosecution will disclose at trial in any case. The safe course for the prosecution in facilitating reciprocal discovery would be to disclose all relevant facts known to it. Needless to say, few prosecutors believe it is appropriate to be so generous.

Jones and Ellis: Two Decisions by Justice Traynor Limiting Prosecutorial Discovery

The case for prosecutorial discovery, as outlined above, is a dual one: to permit the prosecution to meet the defendant's case, if any, and to strengthen its own case. Two opinions by Justice Traynor for the California Supreme Court demonstrate, better than the decisions of the United States Supreme Court, the dual bases for prosecutorial discovery. The first case, Jones v. Superior Court, upheld the pretrial discovery of defendant's evidence to permit the prosecution to better prepare for trial. The second case, People v. Ellis, upheld the pretrial discovery from the defendant of evidence useful to the prosecution in proving its case where production of the evidence was

48. For an analysis of pre-Bagley law, see Capra, Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review, 53 Fordham L. Rev. 391 (1984); see also infra text accompanying notes 257-59.
50. Id. at 3381.
51. Despite the importance of this question, this Article — which primarily focuses on limitations on prosecutorial discovery found in the privilege against self-incrimination — only scratches the surface in addressing it. The only safe conclusion that one can draw is that it does not appear sufficiently reciprocal for the prosecution to disclose only its case-in-chief.
52. See infra text accompanying notes 131-37 & 258-59.
54. 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966).
nontestimonial.

Both Jones and Ellis represent significant victories for the then newfangled notion of prosecutorial discovery;\(^5\)\(^5\) but their holdings, perhaps because of the lack of precedent on which to build, fail to accord prosecutorial discovery its full scope. Jones allows the prosecution to discover only the evidence which the defendant intends to introduce at trial. The prosecution should be able to discover in addition whatever information it needs to test the defendant's evidence through impeachment and rebuttal. Ellis, on the other hand, allows the prosecution to discover an identifying physical characteristic of the defendant. The prosecution should be able to discover in addition specifically described documents or tangible things which it has reason to believe defendants have in their possession or control.

In Jones, a defendant charged with rape obtained a continuance to gather medical evidence to support a defense of impotency. In his motion for continuance, the defendant stated that the impotency resulted from an injury which occurred seven or eight years previously. Quite plainly, the defendant sought to retrieve medical evidence that predated the lawsuit; he was not seeking to create new medical evidence for litigation purposes. The prosecution thereupon sought discovery of the names, addresses and reports of all physicians who had treated defendant for the alleged injury. The trial court granted the prosecutor's request under the system of judicially fashioned discovery then in existence in California. The defendant, prior to trial, sought a writ of prohibition against the trial court's discovery order.

Justice Traynor for the majority in Jones gave the prosecution only half a loaf. The court held that the prosecution could discover the names of medical witnesses the defendant intended to call at trial, and any medical reports and X-rays defendant intended to introduce in evidence in support of his "affirmative" defense of impotency. The prosecution, however, could not discover the identity of any treating physician whom defendant did not intend to call at trial, or any medical report on the injury which defendant did not intend to introduce in evidence. Thus, to avoid surprise at trial, the prosecution was permitted to obtain discovery of defendant's evidence (at least with respect to "affirmative defenses" — whatever they are), but could not obtain discovery of other information known to the defendant that might assist in rebutting the defense.

\(^{55}\) Traynor was an early and most vigorous champion of discovery in criminal cases — discovery which he believed should be a two-way street. See Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L. Rev. 228 (1964).
Despite its limited holding in favor of the prosecution, the tone of Justice Traynor's opinion in *Jones* was very prodiscovery. Traynor treated discovery as a good thing, finding that it is "designed to ascertain the truth," and argued that the prosecution, as well as the defense, deserves to share in its benefits. In an often quoted sentence, Justice Traynor also opined that, "absent the privilege against self-incrimination or other privileges provided by law, the defendant in a criminal case has no valid interest in denying the prosecution access to evidence that can throw light on issues in the case." 

Despite the rhetoric of *Jones*, its holding and analysis recognized a major role for the privilege against self-incrimination in limiting prosecutorial discovery. Pretrial discovery of the witnesses and reports that the defendant intends to present at trial does not violate the privilege because it requires the defendant to do no more than disclose a bit earlier "information that he will shortly reveal anyway." The acceleration of these disclosures merely enables the prosecution "to perform its function at the trial more effectively." This "function" is the "cross-examination" of defense witnesses and the presentation of "effective rebuttal." 

The court reached a different result on the discoverability of the treating physicians whom defendant did not intend to call and the medical reports which defendant did not intend to use as evidence. The assistance sought from the defendant on these matters was different since the prosecution did not have any "independent evidence" of the names of these witnesses or the existence of the reports. The prosecution was seeking "the benefit of . . . [the defendant's] knowledge of the existence of possible witnesses and the existence of possible reports and x-rays for the purpose of preparing its case against him." The distinction is between requiring a defendant to lead the prosecution to new evidence rather than to evidence the defendant intends to use in presenting a defense. According to *Jones*, the defendant's privilege bars compelling the former variety of assistance.

The privilege against self-incrimination thus bars the prosecution from using the defendant's knowledge of relevant information that the defense does not plan to disclose at trial, even though the information itself is not privileged. Thus, the prosecution remains free to investigate the defendant's prior medical history through third parties. Perhaps the defendant's co-workers, insurance agents, or next door neighbors could identify the treating physicians. The prosecu-
tion could then compel such medical witnesses to disclose any relevant information. Once the prosecution learns the identity of a particular physician, it can obtain by subpoena oral testimony and the production of any medical records still in the physician's possession. The defendant's raising of the impotency defense waives any patient-physician privilege with respect to any communications between the defendant and the treating physicians. 62

At first blush this explanation of the antidiscovery half of the Jones holding seems consistent with the two main policies underlying the privilege. The prosecution should gather evidence to convict through its own independent efforts (policy of preserving adversarial system) rather than through using the defendant (policy of protecting human dignity). But matters are not that simple. Why did the prosecution in Jones seek discovery of all medical evidence and not just evidence which defendant planned to introduce at trial? Plainly the prosecution was not seeking evidence of the defendant's potency in order to convict him of rape. Potency is not an element of rape which the prosecution must prove. Under California law, the prosecution need only prove penetration, however slight. 63 The prosecution normally proves penetration through the testimony of the victim. Hence, it is difficult to imagine how evidence on potency would assist the prosecutor in proving penetration. Thus, if the defendant had responded to the trial court's discovery order by stating that he did not intend to introduce any evidence, medical or otherwise, on impotency, the prosecution would have had no interest in pursuing its discovery request. The prosecution did not need the evidence to strengthen its case; and if the defendant did not come forward with some evidence of impotency, his medical condition would simply not be in issue at trial.

What the prosecution in Jones obviously feared was that the defendant would present an incomplete if not distorted picture of his medical condition by disclosing the medical evidence which supported his defense and withholding that which did not. In other words, the prosecution opposed the presentation of relevant evidence when the defendant made only a partial disclosure of what he knew. Three doctors may have treated the defendant for an injury. The


testimony and report of one physician may favor the claim of impo-
tency, while the testimony and report of the other two may be devas-
tating to the defense. The defendant naturally calls the first doctor
as a defense witness, but declines to disclose the names and reports
of the others to the prosecution.

If the prosecution discovers the identity of the undisclosed doctors,
it can use their testimony and reports on rebuttal to discredit the
testimony of the first doctor. Such a rebuttal would surely be more
effective than any cross-examination of defendant’s doctor. Simi-
larly, that rebuttal would be more effective than the prosecution’s
obtaining a new doctor to perform a pretrial medical examination of
the defendant. The dispute in Jones focused on the effect on the de-
fendant of an injury suffered seven or eight years prior to the rape
charge. A medical examination ordered by the trial court, although
plainly not in violation of the defendant’s privilege against self-in-
crimination, would have little weight and certainly lack the probative
force of an examination contemporaneous with the injury.

Thus, the antidiscovery portion of the Jones holding allows the
defendant to suppress potentially effective rebuttal evidence even
though the prosecution lacks alternative means available to test the
evidence presented by the defendant. Perhaps the prosecution will
discover the undisclosed doctors through “independent” investiga-
tion. Resourceful defendants, however, may successfully cover their
tracks by convincing their friends to stay mum. Our concern for a
balanced adversary system supports the discovery and not the sup-
pression of the other doctors and their incriminating reports. Simi-
larly, our concern for human dignity does not prevent compelling de-
defendants from disclosing all they know on a fact in issue when they
disclose part of what they know in an effort to exonerate themselves.

In Ellis, unlike in Jones, the now Chief Justice Traynor permitted
the prosecution to discover evidence which the defendant had no
intent to use and which the prosecution could use, not to rebut de-
fense evidence, but to strengthen its case-in-chief. The defendant El-
lis allegedly had assaulted a woman with intent to rape. After arrest-
ing Ellis, the police compelled him to participate in a line-up and to
repeat various phrases allegedly uttered by the assailant at the time
of the crime. Ellis refused to participate in the voice identification
procedure. At trial, two police officers testified that defendant Ellis
had refused to speak at the line-up, and the prosecutor commented
adversely on defendant’s refusal.

The Ellis court held that the privilege against self-incrimination
does not bar the state from compelling a suspect to supply a poten-
tially incriminating voice exemplar. The privilege should not be read

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64. People v. Ellis, 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966).
Prosecutorial Discovery
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so broadly as to prohibit the state "from demanding assistance of any kind from an individual in penal proceedings taken against him." Compelling nontestimonial assistance, like the supplying of a voice exemplar, does not violate the privilege because it does not involve any reliance on the veracity of the defendant. A person’s voice, like one’s eyes, hair, or skin, is an observable physical characteristic. Any attempt by the defendant to disguise his voice is “readily” detectable; and there is “no risk that one could be coerced into falsely accusing himself.”

The California Supreme Court relied in part on the United States Supreme Court’s prior ruling that the privilege against self-incrimination did not bar the state from compelling a suspect to supply a blood sample. The Court had viewed the coerced participation of the blood donor as nontestimonial. The Supreme Court subsequently, without citing Ellis, reached the same result with respect to the compelling of voice and handwriting exemplars. Unlike the Justices of the Supreme Court, who were content simply to announce that the compelled production of identifying characteristics did not involve any communication or testimony by the suspect, Chief Justice Traynor in Ellis sought to reconcile that result with the policies underlying the privilege.

Chief Justice Traynor’s analysis focused on the role of the privilege in protecting human dignity and guaranteeing the fair treatment of individuals. According to Traynor, the defendant in Ellis, when directed to supply a voice exemplar, did not face the same “psychological pressures” generated by a demand for testimony because he confronted a more limited number of alternatives. Since deceit (that is, disguising one’s voice) is improbable, “the simple choice for a guilty person is between conduct likely to expose incriminating evidence and inferences as to guilt likely to flow from a successful refusal to participate.” Traynor did not consider unfair the importance of that choice for a suspect, particularly in light of the

65. Id. at 534, 421 P.2d at 395, 55 Cal. Rptr. at 387.
66. Id.
69. Ellis, 65 Cal. 2d at 535, 421 P.2d at 396, 55 Cal. Rptr. at 388.
70. Id.
71. See also Judge Aldrich’s holding that compelling a suspect to take dictation violates the privilege because spelling is an intellectual process requiring choice. United States v. Campbell, 732 F.2d 1017 (1st Cir. 1984). In Campbell, the offender’s writings evidently contained a pattern of misspellings.
fact that there is no danger that the pressure might cause the suspect falsely to accuse himself. In addition, Traynor argued that the compelling of voice exemplars was consistent with a fairly balanced adversary system. Independent identification testimony was “the very type of objective factual evidence” which the privilege encouraged the police to seek. The privilege should not ban identification evidence even though obtaining it required some cooperation by the suspect.

Strictly speaking, Ellis is not a discovery case. The police made their demand for a voice exemplar during a precharge investigation. Ellis was under arrest, yet there was no formal criminal proceeding with parties, pleadings, and discovery. Nevertheless, the court’s reasoning applies with equal if not more force to the discovery stage. In fact, both the ABA Standards for Criminal Justice and the Uniform Rules of Criminal Procedure (Uniform Rules) adopted by the National Conference of Commissioners on Uniform State Laws recommend that the prosecution obtain the production of nontestimonial evidence from the defendant through discovery rather than through police investigatory techniques. Both the Standards on Discovery and the Uniform Rules contain specific provisions authorizing prosecutorial discovery of the defendant’s physical characteristics such as the defendant’s person (for participation in a line-up) or the defendant’s voice exemplar. The compelled production of this evidence, at least in the opinion of the drafters, does not include any testimony by the defendant.

The drafters of these provisions recognize that police have in the past acquired this evidence during the investigatory stage prior to a suspect’s first appearance in court. While acknowledging that there is sometimes a need for the police to obtain physical evidence promptly (for example, any alcohol in an arrestee’s blood will soon disappear), the drafters argue that in most cases the evidence subject to discovery is not likely to change (for example, the defendant’s physical appearance or voice is unlikely to change over a period of

72. Ellis, 65 Cal. 2d at 534, 421 P.2d at 395, 55 Cal. Rptr. at 387.

73. In Ellis, the police had probable cause to believe the defendant Ellis was the assailant at the time they demanded a voice exemplar. In Dionisio, on the other hand, the government did not have probable cause to arrest anyone for the offense under investigation but used the grand jury to obtain voice exemplars from approximately 20 persons. Dionisio, 410 U.S. at 3. The Court nevertheless rejected the witness’ claim of privilege without recognizing that the witness had a stronger fifth amendment claim not to be disturbed until the state had more cause than did an arrestee like Ellis or a criminal defendant.

74. 2 STANDARDS FOR CRIMINAL JUSTICE Standard 11-3.1 (2d ed. 1980).


76. For reference, see the commentary to Uniform Rule 434 in 10 U.L.A. 154-56 (1974), and the commentary to Standard 11-3.1, 2 STANDARDS FOR CRIMINAL JUSTICE 11.43-11.50 (2d ed. 1980).
several weeks). It is therefore preferable for the prosecution to obtain such evidence through discovery in order to shorten or avoid precharge police detention of the suspect and to provide the necessary judicial authorization for any searches or seizures required to obtain the evidence.

Most states that permit prosecutorial discovery follow the Standards on Discovery and the Uniform Rules and authorize discovery from the defendant of evidence obtainable without compelling any testimony. Whether this change reduces the incidence of detention to obtain such evidence or increases the level of judicial involvement in the process is uncertain; but at least the prosecution need not fear that defendants are no longer available as a source of identifying or physical evidence once they appear in court and make bail.

The utility of this form of discovery to the prosecution depends of course on the definition of "nontestimonial." Both the Standards on Discovery and the Uniform Rules equate nontestimonial production with the production of identifying or physical evidence from the defendant’s person. Standard 11-3.1(c), for example, authorizes the court to order the defendant to appear in a line-up, try on clothing or other articles, permit the taking of specimens of blood, urine or other materials on or from the body, submit to a reasonable physical or medical inspection, or participate in other procedures for obtaining nontestimonial evidence. The court must find that the evidence sought is relevant, that the procedure for obtaining it does not involve an unreasonable intrusion of the body or an unreasonable affront to the dignity of the individual, and that the request is reasonable. Despite the catchall phrase "participate in other procedures," it is plain that the drafters did not intend to permit the prosecution to discover tangible things, such as weapons or items of clothing. The drafters plainly intended to limit the prosecution to the discovery of information "about the person of the accused." Since the tangible things listed above are no more testimonial, as that word is normally understood, than the defendant's blood or voice, it is not readily apparent why they should not also be discoverable.

This limitation of prosecutorial discovery to identifying or physical evidence from the defendant’s person reflects present law. Common-

77. See, e.g., Md. R. 4-263.
78. Unif. R. Crim. P. 434(c) contains a very similar but somewhat lengthier list of identification evidence obtainable from the defendant. 10 U.L.A. 158 (1974).
79. 2 Standards for Criminal Justice Standard 11-3.1(b) (2d ed. 1980).
80. 2 Standards for Criminal Justice 11.43 (commentary on Standard 11-3.1) (2d ed. 1980)).
wealth v. Hughes is the lead opinion. In Hughes, Massachusetts charged defendant with two counts of assault with a dangerous weapon. The assault involved firing two rounds of ammunition through the front windshield of a truck in which the victims were sitting. Prior to trial, the prosecution obtained a court order compelling defendant to produce a revolver (designated by serial number) registered in his name. The defendant refused to comply with the order, and the trial court subsequently held him in contempt. The Supreme Judicial Court of Massachusetts reversed the contempt conviction on the ground that the defendant had validly claimed his privilege against self-incrimination. Justice Kaplan's reasoning, as will be seen, focused not on any testimonial qualities of the gun but on the testimonial aspects of the compelled production.

No privilege attached to the revolver itself, and the prosecution could have seized it under a warrant if it knew where the revolver was. The shooting charge provided probable cause to seize as evidence any revolver registered to the defendant; and the police could search for it in the defendant's home or wherever else they could convince a magistrate there was an adequate basis for believing they might find it. Indeed, the police had obtained a warrant to search the defendant's car for the revolver, but the search had proved fruitless. Finally, if the defendant had shown the gun to the prosecutor in the courtroom corridor with the taunting remarks "Here is my registered gun but you cannot have it," the prosecutor could have immediately seized the weapon. In this hypothetical scenario, the prosecutor's observations would be sufficient probable cause to effectuate a warrantless plain view seizure. Moreover, the seizure itself would not violate the defendant's privilege because the defendant did not participate in the seizure but merely submitted to it. Since the prosecutor did not require the defendant to do anything, there was no "compulsion."

The prosecution's dilemma in Hughes was that it did not know whether the weapon still existed or what the defendant had done with it in the year that had transpired since the alleged offense. All the prosecution knew was that the defendant purchased and registered the revolver on March 23, 1976 — roughly twenty-seven years ago.

82. A search warrant must particularly describe the place to be searched as well as the things to be seized. The probable cause requirement applies both to the seizability of the thing and its location in the place to be searched. Where the police have probable cause to believe a particular individual committed a crime and possesses somewhere particular items of incriminating evidence, courts have been fairly liberal in upholding warrants to search the defendant's home or other places with which the defendant has continuous contact. Commonwealth v. DeMasi, 362 Mass. 53, 283 N.E.2d 845 (1972).
months before the alleged assault — and had not filed any report for the transfer of the gun. According to Justice Kaplan, the prosecution, in demanding the production of the gun, was “seeking to be relieved of its ignorance or uncertainty by trying to get itself informed of knowledge the defendant possesses.”\(^8\) The defendant, by producing the weapon, would be making a statement about the gun’s present “existence” and about his “possession” of it. The statement implied from the act of production would also serve to authenticate the gun produced as the gun sought by the court order (that is, the gun registered to the defendant).

The court found that these implied statements conveyed to the prosecution “new knowledge” and were thus testimonial under *Fisher v. United States,*\(^8\) the leading case applying the *Schmerber* trilogy to claims of privilege by the recipients of subpoenas for documents. In addition, “the avowals” sought from the defendant were “incriminating” because the prosecution intended to run ballistic tests on the gun, which might lead to expert testimony “tying the revolver to the actual assault.”\(^7\) The defendant therefore had a valid claim of privilege because the court order directing him to produce the gun sought to compel (the compulsion prong) implied statements (the testimonial prong) which might result in a positive ballistic test (the incrimination prong).

*Hughes* certainly represents the majority approach in condemning subpoenas for incriminating tangible evidence.\(^8\) Indeed, the law is so clear that few prosecutors bother to seek subpoenas or court orders compelling a defendant to produce documents or tangible items that might strengthen the prosecution’s case. There is nevertheless, as argued by Judge Friendly, a “reek of the oil lamp” in the doctrine of testimonial production\(^8\) applied in *Hughes* and *Fisher.* In *Hughes,* the prosecution wanted the gun to conduct a ballistic test. It had a

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85. *Hughes,* 380 Mass. at 592, 404 N.E.2d at 1244 (quoting People ex rel. Bowman v. Woodward, 63 Ill. 2d 382, 387, 349 N.E.2d 57, 60 (1976)).
87. *Hughes,* 380 Mass. at 593, 404 N.E.2d at 1245.
right of "lawful access" to the incriminating contents of the gun. The defendant had no right to deny the prosecution that access, and, if the police discovered the gun in plain view or while searching for it under a warrant, the defendant could not forcibly prevent its seizure. The prosecution had little interest or need for any implied statements by the defendant that would accompany the act of production. The serial number and registration documents provided a ready basis for authenticating the gun without the defendant's help. No doubt an admission by the defendant that the gun still existed and that he still possessed it sometime after the alleged crime might have some relevance in establishing the defendant's guilt; but the prosecution had no real need for that evidence to prove its case. The absence of any transfer report already provided some evidence of the defendant's continuing possession of the gun, which is not an element of the offense charged in any case.

The incriminating evidence really sought by the prosecution was a ballistic test connecting the gun with the crime. The Hughes court mistakenly treated the danger that the test results might incriminate the defendant as satisfying the incrimination prong for a valid claim of privilege. In the court's language, the defendant's production of the gun would furnish "a link in the chain of evidence" leading the prosecution to the incriminating ballistic test. This analysis is inconsistent with Supreme Court cases on investigatory subpoenas for documents in which the Court has made it clear that the incriminatory contents of documents do not provide any basis for a claim of privilege. Thus, the Court in Fisher found that there was no incrimination in the taxpayer's compelled production of his accountant's papers. The Court reasoned that there was nothing illegal or even suspicious about a taxpayer consulting an accountant concerning his tax liability and accepting delivery of the accountant's work papers. The Court did not inquire whether the contents of the papers might assist the government to convict the taxpayer of criminal tax fraud. Surely the government believed that the papers would so incriminate the taxpayer or it would not have sought their production. Thus, in Hughes, as in Fisher, the incriminating testimony must be found in the implied statements as to existence, possession and authenticity that accompany the act of production.

The defendant's admission that he possessed a gun a year after the date of the alleged shooting (the contempt adjudication occurred

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90. The phrase is Chief Judge Coffin's from an opinion making an argument similar to that found in the text. In re Grand Jury Proceedings, 626 F.2d 1051, 1056 (1st Cir. 1980).
91. Hughes, 380 Mass. at 593, 404 N.E.2d at 1245 (quoting Maness v. Meyers, 419 U.S. 449, 461 (1975)).
about a year later) may conceivably incriminate the defendant once the prosecution links the gun to the crime through a ballistic test or other evidence. The defendant’s implied statement may therefore strengthen the prosecution’s case, although the prosecution would happily forgo using the defendant’s “avowals” if a grant of use immunity would suffice to obtain the evidence the prosecution really wanted — an incriminating ballistic test. As the grant of use immunity needed to compel the testimonial production of documents need not extend to the contents of the documents,\(^3\) the grant of immunity needed to compel the production of the gun should not affect the prosecutor’s use of the ballistic test itself. The gun, like the documents themselves, should remain fully available to the prosecution as evidence.

The availability of use immunity only highlights the threshold question: what purposes behind the privilege against self-incrimination support treating as testimonial and privileged the production of a gun, but as nontestimonial and unprivileged the production of blood, a voice exemplar, or other physical evidence connected with the defendant’s person? Given the prosecution’s right of access to the gun (that is, the prosecution had probable cause to seize it as evidence of crime), it is difficult to see how compelling the defendant to make it accessible to the prosecution adversely impacts a fair state-individual balance or violates human dignity any more than compelling the defendant to supply a blood or voice sample. The defendant has no right (constitutional or otherwise) to destroy the gun;\(^4\) and the prosecution has a valid interest in using the gun to convict the defendant if it could obtain that evidence without compelling any testimony from the defendant.

Of course, a defendant compelled to produce a gun faces a greater range of alternatives than a defendant compelled to produce blood or a voice exemplar. In particular, the opportunities for perjury are greater, as the defendant may be tempted falsely to deny continuing possession of the gun. In cases such as Hughes, a denial of present possession arguably poses an additional danger of incrimination because Massachusetts law punishes a gun registrant who transfers the

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94. Segura v. United States, 468 U.S. 796, 816 (1984) (no constitutional right to destroy evidence). In many jurisdictions efforts by a suspect or defendant to conceal or destroy incriminating evidence may be admissible as evidence reflecting consciousness of guilt and may even constitute an obstruction of justice. See People v. Burton, 55 Cal. 2d 328, 359 P.2d 433, 11 Cal. Rptr. 65 (1961).
gun without reporting the transfer. On the other hand, there is little danger of false accusation in the case either of the gun or the voice exemplar. With respect to the voice exemplar, the defendant's implied statement that "this is my voice" is not testimonial because, in the Court's words, it is "self-evident" and adds no information to the prosecution's case. Once the prosecution has the gun, the same is true with respect to the defendant's implied statement "this is my gun." The serial number on the gun provides a ready means of authentication which justifies treating the defendant's admission as a foregone conclusion. The same cannot be said of the defendant's implied statements on the gun's existence and the defendant's possession of it; but, as will be seen below, discovery rules can provide the defendant a safe mechanism for producing through counsel documents or tangible things to which the prosecution has a right of legal access. The rules could minimize, if not eliminate, any testimony by defendants and thus harmonize the prosecution's right of legal access with the defendants' right not to have the testimonial implications of their submissions used against them.

**The Case for Broader Prosecutorial Discovery of Defense Evidence**

*Discovery of Evidence the Defendant Intends to Introduce at Trial*

Before arguing that Jones incorrectly limited prosecutorial discovery, it is necessary to defend the half of the Jones holding which upheld the prosecution's discovery of evidence that the defendant intended to introduce to support the affirmative defense of impotency. That holding also presents some difficulties recognized, in particular, by the court's peculiar reference to impotency as an "affirmative" defense.

Impotency is surely not an affirmative defense under the standard definition. In introducing evidence of impotency, the defendant seeks to raise a reasonable doubt on one of the elements of rape.

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95. Mass. Gen. Laws Ann. chs. 269, § 10(h), 140, § 129C (West 1974). The registrant's nonpossession does not establish by itself an offense because the registrant may have discarded or destroyed the gun (for which he need not file a report) rather than have transferred it.

96. *Fisher*, 425 U.S. at 411. The Court made its point by referring to a handwriting exemplar.

97. *In re Grand Jury Proceedings*, 626 F.2d 1051, 1056 (1st Cir. 1980) (Coffin, C.J.) (finding a need to harmonize but suggesting no solution).

98. The term "affirmative defense" generally refers to defenses on which the defendant has the burden of coming forward with some evidence in order to interject the defense into the case. Once the defendant satisfies that burden, the court must instruct the jury on the defense and, if the defense negates an element of the crime, the prosecution must establish that element (e.g., the lack of justification for a killing) beyond a reasonable doubt. See Model Penal Code § 1.12(2) (Proposed Official Draft 1962).
(penetration). The evidence therefore denies the prosecution's case rather than supports an affirmative defense. What the Jones court must have had in mind was that impotency was the type of defense where it was difficult to imagine how the defendant's evidence could help the prosecution prove the elements of the offense. Thus, in limiting prosecutorial discovery, at least initially, to affirmative defenses, the court implicitly recognized the difficulty posed by defense evidence that could help the prosecution prove its case-in-chief. The California Supreme Court's subsequent highlighting of that difficulty contributed to its ultimate rejection of prosecutorial discovery.

The favorable reception given elsewhere to the prodisclosure portion of the Jones holding did not include any mention of the affirmative defense limitation. The Supreme Court in Williams v. Florida for example, adopted Justice Traynor's acceleration rationale when it upheld a notice of alibi statute. As the statute only required defendants to disclose prior to trial the names and addresses of the alibi witnesses they intended to call at trial, it did not, according to the Court, "compel" any disclosures but only "accelerated" the timing of the disclosures defendants chose to make. The statute therefore did not compel defendants to incriminate themselves in violation of the fifth and fourteenth amendments.

Justice Black, in his Williams dissent, recognized, as have the commentators, that an alibi is not an affirmative defense in the sense Justice Traynor used that phrase because an alibi witness ne-

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99. Alibi evidence is also denial evidence which the defendant introduces to raise a reasonable doubt about criminal agency. It is still possible to call an alibi an affirmative defense because the defendant must come forward with some evidence of alibi to obtain an instruction informing the jury that it must acquit if the alibi evidence raises a reasonable doubt about the defendant's guilt. Smith v. State, 302 Md. 175, 486 A.2d 196 (1985). There is no authority for the granting of an analogous instruction on the effect of a rape defendant's alleged impotency. A defendant suffering from impotency may still be able to achieve the necessary penetration, and emission is not required for the crime. W. CLARK & W. MARSHALL, CRIMES 762 (7th ed. 1967).

100. The commentators have so interpreted Traynor's reference to affirmative defenses. See Louisell, Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma, 53 CALIF. L. REV. 89, 92 n.18 (1965); Nakell, Criminal Discovery for the Defense and the Prosecution: The Developing Constitutional Considerations, 50 N.C.L. REV. 437, 497-98 (1972). Arguably, even defense evidence of impotency may conceivably contribute to the prosecution's case. See Prosecution's Right to Discovery, 59 CALIF. L. REV. 225, 228 (1971) (remediable psychological impotency).
cessarily has some knowledge of the defendant and his activities and may supply the prosecution with information or leads that could place the defendant at the scene of the crime. The majority did not respond to this difficulty, perhaps because no such information surfaced after the defendant in *Williams* had complied with the statute and had disclosed the name and address of his alibi witness. The prosecutor then used that information to obtain both impeachment\textsuperscript{105} and rebuttal\textsuperscript{106} evidence that effectively destroyed the defendant's alibi. There is nothing in the majority opinion, however, to indicate that the Court would have reached a different result if the disclosed alibi witness had led the prosecutor to another "friend" of the defendant who placed him at the crime scene.

The *Williams* Court did recognize that the defendant's disclosures under the notice of alibi statute were potentially incriminating even if they did not provide the prosecution with additional evidence placing defendant at the scene of the crime.\textsuperscript{107} Evidence is incriminating if it assists the prosecution in convicting the defendant of a crime.\textsuperscript{108} The defendant's disclosures helped the prosecution to convict the defendant by permitting the prosecution to destroy the defendant's alibi. The Court reasoned that this incriminating use of the disclosures was permissible because the defendant's disclosure of the alibi witness at trial could have also helped the prosecution to convict. The prosecutor's cross-examination of the alibi witness could have uncovered "incriminating rebuttal evidence,"\textsuperscript{109} or the prosecution could have obtained a continuance to do the investigation necessary to re-

\textsuperscript{105} The prosecutor deposed the alibi witness prior to trial and used that deposition to impeach her trial testimony. *Williams*, 399 U.S. at 81.

\textsuperscript{106} The prosecutor's investigation obtained evidence that the alibi witness was elsewhere than with the defendant at the time of the crime. *Id.*

\textsuperscript{107} "However 'testimonial' or 'incriminating' the alibi defense proves to be it cannot be considered compelled ..." *Id.* at 84.

\textsuperscript{108} McCORMICK ON EVIDENCE, supra note 62, § 121(a); Lushing, *Testimonial Immunity and the Privilege Against Self-Incrimination: A Study in Isomorphism*, 73 J. CRIM. L. & CRIMINOLOGY 1690, 1707-08 (1982). Thus, evidence admissible for the prosecution only to rebut a defense may incriminate the defendant. United States v. Byers, 740 F.2d 1104, 1112-13 (D.C. Cir. 1984) (en banc) (insanity defense). While there is surprisingly little federal constitutional authority for this point, it seems to be self-evident. Rebuttal evidence increases the likelihood of the defendant’s conviction. Evidence rebutting an alibi, for example, both strengthens the prosecution’s evidence of the defendant’s presence at the crime scene and undermines the defendant’s effort to raise a reasonable doubt on absence. Evidence admissible only to impeach a defense witness also may incriminate a defendant, although the only direct authority for that proposition involves evidence used to impeach a testifying defendant’s credibility. See New Jersey v. Potash, 440 U.S. 450, 459-60 (1979) (defendant’s prior immunized testimony not admissible to impeach defendant’s credibility; such an incriminating use prohibited by grant of immunity). For a clear state constitutional holding that impeachment or rebuttal evidence eviscerating a defense “incriminates” the defendant, see *In re Misener*, 38 Cal. 3d 543, 558, 698 P.2d 637, 647, 213 Cal. Rptr. 569, 579 (1985).

\textsuperscript{109} *Williams*, 399 U.S. at 83-84.
but the defense.\textsuperscript{110} Therefore, the "pressures" generated by the state's evidence, which may cause the defendant to present an "incriminating" defense, are similar at the trial and pretrial stages.\textsuperscript{111} In neither situation does the state compel the defendant to incriminate himself by presenting defense evidence.

The pretrial investigation is likely to be more thorough than a midtrial investigation and is, therefore, a substantial advantage to the prosecution. The \textit{Williams} Court did not deny that fact and indeed emphasized it by describing the thorough and effective pretrial investigation actually conducted by the prosecutor in that case. According to the Court, the prosecutor's success demonstrated the legitimacy of prosecutorial discovery because both the prosecution and the defendant have a strong interest in having "an ample opportunity" to investigate the facts in dispute.\textsuperscript{112} Another way to make the same point might be to say that there is no danger of incrimination if a disclosure only permits the prosecution to present more effectively evidence to which it already has lawful access.\textsuperscript{113} The privilege does not protect the defendant from the prosecutor's efforts to be as well prepared for trial as possible.

At least fifteen states have followed \textit{Jones} and \textit{Williams} in authorizing pretrial discovery by the prosecution of all the defendant's evidence.\textsuperscript{114} In these states, the prosecutor may discover the names of the witnesses the defendant intends to call and any documentary evidence (including reports of experts) or tangible things the defendant intends to present at trial. In a substantial number of additional states the prosecution may discover documents and tangible things, but not the identity of defense witnesses.\textsuperscript{115} These discovery rules are of course subject to applicable constitutional limitations (the rules usually say so explicitly); and courts have generally interpreted them, even when their language is unclear, to permit discovery only of what defendants intend to disclose at trial.\textsuperscript{116}

\textsuperscript{110} \textit{Id}. at 85.
\textsuperscript{111} \textit{Id}. at 84.
\textsuperscript{112} \textit{Id}. at 82.
\textsuperscript{113} \textit{See} McCORMICK ON EVIDENCE, \textit{supra} note 62, \S 121(a), at 292 (no incrimination if disclosure leads to the admissibility of evidence allegedly unlawfully seized).
\textsuperscript{114} 2 W. LAFAYE \& J. ISRAEL, CRIMINAL PROCEDURE \S 19.4(f), at 748 (1985).
\textsuperscript{115} \textit{Id}. \S 19.4(b), at 750 (includes all states with general criminal discovery rules).
The Alaska Supreme Court is the only court that follows the present approach of the California Supreme Court in rejecting altogether prosecutorial discovery of defense evidence. The ABA, however, in its 1978 revision of the Standards on Discovery, did limit prosecutorial discovery of defense witnesses to alibi and mental condition witnesses — witnesses whom the prosecutor had a special need to discover before trial.

The California Supreme Court not only has rejected Jones but has barred all prosecutorial discovery. Two major themes run through that court's post-Jones discovery decisions. First, the privilege against self-incrimination precludes most if not all pretrial discovery of the defendant's evidence because disclosures may assist the prosecution to prove guilt. Because the Supreme Court in Williams adopted a less restrictive interpretation of the federal privilege against self-incrimination (finding only acceleration and not compulsion), the California Supreme Court turned to the state constitution as the basis for its rulings. Second, trial courts should not implement prosecutorial discovery on a case-by-case basis through judicially fashioned discovery orders. Prosecutorial discovery must await a comprehensive set of discovery rules specifying what discovery is available to both parties.

The lead California decision rejecting Jones is Prudhomme v. Superior Court. The Prudhomme court argued that the timing of the defendant's disclosure of evidence may make a difference because a pretrial disclosure "conceivably might lighten the prosecution's burden of proving its case in chief." For example, a murder defendant's disclosure of a self-defense witness at trial by calling the witness to the stand permits the prosecution to gather impeachment or rebuttal evidence but does not permit the prosecution to use that witness to prove its case-in-chief. Pretrial disclosure of the witness, on the other hand, might result in the witness testifying for the prosecution to establish the actus reus of the offense charged (the defend-

118. 2 STANDARDS FOR CRIMINAL JUSTICE Standard 11-3.3 (1980). The prosecution can still discover prior to trial the reports (and thus the identities) of any experts who will testify for the defendant. Id. at Standard 11-3.2. For the earlier standard approving prosecutorial discovery of all defense witnesses, see STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL 2-6 (Approved Draft 1970).
119. Because the California Supreme Court did not have authority to promulgate court rules for discovery, and because the legislature had declined to do so by statute, the court concluded that prosecutorial discovery must await legislative action. Although the California Supreme Court's interpretation of the privilege does not appear to be correct, the court is on sounder ground in concluding that a comprehensive set of court rules is a prerequisite for ensuring fair, reciprocal discovery.
120. 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970).
121. Id. at 326, 466 P.2d at 677, 85 Cal. Rptr. at 133.
The Prudhomme court concluded that the criminal defendant should have the same right as "an ordinary witness to show that disclosure of particular information could incriminate." Therefore, the prosecution could not obtain the discovery of the names, addresses and expected testimony of defense witnesses unless it "clearly appear[ed]" that the disclosures could not possibly incriminate the defendant by providing an essential link in a chain of evidence underlying the prosecution's case-in-chief.

Prudhomme's holding surely would have surprised Justice Traynor, who had assumed in Jones that the privilege applicable to pretrial discovery in criminal cases was the broader criminal defendant's privilege and that the defendant need not show any danger of incrimination. For Traynor, prosecutorial discovery was constitutional, not because there was no incrimination, but because there was no compulsion. While Prudhomme did not address the acceleration rationale, its defenders might respond that there is "compulsion" at the pretrial stage if there is present a risk of incrimination which is no longer present when the defendant voluntarily discloses evidence at trial.

Prudhomme's condemnation of pretrial disclosures as "incriminating" effectively ended prosecutorial discovery in California. California judges proved to have fertile imaginations by finding it easy to conceive how defense disclosures prior to trial might help the prosecution prove its case. In Allen v. Superior Court, the court, basing its holding on state constitutional grounds, struck down a trial court order requiring the defendant to disclose the names of defense witnesses on voir dire. Although the trial judge ordered the prosecution not to contact the defendant's witness prior to trial, the California Supreme Court nonetheless still speculated that the disclosures might incriminate the defendant because the prosecution could use the names to anticipate possible defenses (for example, the listing of friends or relatives as defense witnesses suggests an alibi defense, the listing of police officers suggests an entrapment defense). The dissent cogently argued that the list of names gave the prosecution only "the barest indication of potential defenses" (an indication, one

122. Id.
123. Id.
124. Id.
125. Jones, 58 Cal. 2d at 60, 372 P.2d at 920-21, 22 Cal. Rptr. at 881.
126. 18 Cal. 3d 520, 557 P.2d 65, 134 Cal. Rptr. 744 (1976).
127. Id. at 526 n.4, 557 P.2d at 68 n.4, 134 Cal. Rptr. at 777 n.4.
128. Id. at 531, 557 P.2d at 71, 134 Cal. Rptr. at 780 (Richardson, J., dissenting).
might add, on which the prosecution would be ill-advised to rely), and complained that under the majority’s approach “any free-floating hypothetical risk [of incrimination], no matter how remote, how tenuously related to the facts of the particular case, will bar all prosecutorial discovery.”^129

In *People v. Collie*^130 the court took the next logical step and barred all prosecutorial discovery absent specific legislative authorization. *Collie* is a wise decision given the peculiar situation of the California Supreme Court. Neither the California Constitution nor any California statute authorizes the supreme court to promulgate court rules governing practice and procedure. Trial courts have therefore ordered both prosecutorial and defense discovery on a case-by-case basis. Such a system is a questionable way to assure the defendant reciprocal discovery required by due process.

In *Wardius v. Oregon*,^131 the United States Supreme Court held that a state could not require a defendant to disclose an alibi defense prior to trial unless the defendant had “fair notice that he would have an opportunity to discover the State’s rebuttal witnesses.”^132 The aspect of reciprocal discovery emphasized in *Wardius* was defense discovery of the prosecution’s rebuttal witnesses. By the same token, it also seems unfair to expect the defendant to disclose alibi witnesses unless the prosecution first states the time and place of the alleged crime. In *Wardius* the court held that the prosecution should not be permitted simply to demand that the defendant disclose what defenses he intends to raise and what evidence he intends to produce in support of a defense. Fairness requires that a defendant have adequate discovery of the prosecution’s evidence before choosing what evidence, if any, to present. Although *Wardius* did not analyze reciprocity so broadly, the acceleration rationale requires that a defendant have roughly the same knowledge of the state’s case when making a pretrial choice to present evidence as when making the same choice at trial. Although

129. *Id.* at 532, 557 P.2d at 71, 134 Cal. Rptr. at 780.
132. *Id.* at 479.
133. See *FED. R. CRIM. P.* 12.1 (defendant’s alibi disclosure obligations triggered by “written demand of the attorney for the government stating time, place, and date of alleged offense”).
134. *Jones*, 58 Cal. 2d at 62, 372 P.2d at 925, 26 Cal. Rptr. at 882-83 (Peters, J., dissenting). In *Jones*, the prosecution fortuitously learned the nature of the defendant’s defense when the defendant sought a continuance to gather evidence of his impotency.
135. *Wardius* defined the defendant’s reciprocal discovery as discovery of the state’s rebuttal evidence. That definition may be appropriate for an alibi defense. It is fair to expect a defendant to choose an alibi defense without knowing the prosecution’s entire case — at least if the defendant knows the time and place of the alleged offense. With respect to defense evidence other than alibi evidence (e.g., evidence of self-defense, duress, mistake), it would seem that the defendant must receive more information about
it may be possible to achieve reciprocity without formal discovery rules, the California Supreme Court concluded that the task of monitoring discovery orders fashioned by trial judges on a case-by-case basis was too burdensome and did not give the defendant sufficient assurance of reciprocal treatment.\textsuperscript{136} That judgment appears to be sound. The chances of achieving a fair system of reciprocal discovery are greater if defendants, before they must furnish discovery, receive from court rules the necessary "fair notice"\textsuperscript{137} on the discovery available to them.

On the other hand, the California Supreme Court's distinction between different prosecutorial uses of defense evidence — the distinction between using the evidence to prove the prosecution's case-in-chief as opposed to using it to impeach or rebut defendant's case — appears to be unsound. First of all, as argued above, both uses are incriminating uses.\textsuperscript{138} Second, there are no sharp temporal limitations on the prosecution's case-in-chief. While that term normally refers to the evidence presented by the prosecution prior to the defendant's case, the trial judge has discretion to vary the conventional order of proof and to allow the prosecution to reopen its case after the defendant has rested. The prosecution may then present additional evidence, even though that evidence is not admissible as rebuttal evidence.\textsuperscript{139} At that point, the prosecution will have received any benefit obtainable from hearing the defendant's evidence. Third, common sense tells us that it is a rare occurrence when the defendant's evidence (the evidence the defendant presents to exculpate himself) really will help the prosecution prove its case-in-chief. If that were not so, the defendant would be at a real disadvantage at a retrial following an appelate reversal of an earlier conviction. The United States Supreme Court has not even mentioned that disadvantage when discussing the permissibility of a retrial, although the Court has barred a retrial if the reversal was for insufficient evidence.\textsuperscript{140} Fourth, and most importantly, even in the exceptional case


\textsuperscript{137} Wardius, 412 U.S. at 479.

\textsuperscript{138} See supra note 108.

\textsuperscript{139} Mays v. State, 283 Md. 548, 391 A.2d 429 (1978); 6 J. Wigmore, supra note 36, § 1867.

\textsuperscript{140} Burks v. United States, 437 U.S. 1 (1978).
where the defense witness may help the prosecution prove an element of the offense, the incriminating consequences of pretrial disclosure are analogous to those of disclosure at trial.\textsuperscript{141}

As Justice White recognized in \textit{Williams}, presenting a defense may prove to be incriminating.\textsuperscript{142} The jury will decide whether the defendant is guilty by considering all of the evidence and not just the prosecution's evidence.\textsuperscript{143} Judges, in reviewing the sufficiency of the evidence to support a conviction, will review all the evidence of guilt and not just the evidence introduced by the prosecution.\textsuperscript{144} The prosecution may use to convict a defendant incriminating evidence presented at trial by the defendant.

The defendant thus faces the same risk of incrimination at trial as before trial when deciding to call and thus disclose a defense witness. In both cases, the witness may incriminate the defendant. The defendant must choose between the fifth amendment privilege against self-incrimination and the sixth amendment right to present witnesses, including one's self, in one's own defense. Although the Supreme Court in \textit{Simmons v. United States}\textsuperscript{145} held that the state could not require a criminal defendant to surrender one constitutional right (there the fifth amendment privilege) to invoke another (the fourth amendment right to exclude unconstitutionally seized evidence), that holding has inspired no progeny. The Court seemingly abandoned it in \textit{McGautha v. California}\textsuperscript{146} and now employs a balancing test to evaluate choices required of criminal defendants.\textsuperscript{147} That approach permits consideration of state interests in requiring an election and the effect such an election has on the constitutional rights at stake. The compelled election is constitutional if it does not

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\textsuperscript{141} A hypothetical best illustrates this last point. Take the case of the self-defense witness in a murder prosecution who is also of course a witness to the homicide. Let us assume that the prosecutor does not discover the witness' identity until the defendant calls the witness at trial. The witness' testimony may be very convincing on the defendant's killing the deceased but very shaky on the claim of self-defense. Is not the prosecution free to argue that the fact-finder should believe the first part of the witness' testimony but not the second part? A self-defense witness necessarily incriminates the defendant on the \textit{actus reus} of the killing; that incrimination may prove fatal to the defendant if the jury does not believe the witness' testimony on self-defense. Defendants accept this risk when they decide to call a self-defense witness.

\textsuperscript{142} \textit{Williams}, 399 U.S. at 83-84.


\textsuperscript{144} See infra notes 152-54 and accompanying text.

\textsuperscript{145} 390 U.S. 377 (1968).

\textsuperscript{146} 402 U.S. 183 (1971). In \textit{McGautha}, Justice Harlan, who had also written \textit{Simmons}, retreated from the earlier approach. He did not question the soundness of the result in \textit{Simmons}, but he did indicate that, “to the extent that . . . [the \textit{Simmons}] rationale was based on a 'tension' between constitutional rights . . . , the validity of that reasoning must now be regarded as open to question.” \textit{Id.} at 212.

violate the policies behind the rights at stake.\textsuperscript{148}

The election required of a defendant who wishes to present evidence should easily pass constitutional muster. In fact, it has never really been considered vulnerable to challenge. It is a long-accepted and reasonable condition on the right to present a defense that the prosecution may not only seek to impeach or rebut the defendant's evidence, but may also use it to secure a conviction.\textsuperscript{149} The state has a strong interest in fully testing a defendant's evidence and in obtaining a jury verdict based on all the evidence in the trial record. That interest justifies compelling a defendant to choose between presenting no evidence and presenting evidence which the prosecution may use to incriminate.

As to the effect on the defendant's rights, this election imposes a lesser burden than does the election upheld in \textit{Crampton v. Ohio},\textsuperscript{150} the companion case to \textit{McGautha}. There the defendant, in order to exercise his (assumed) constitutional right of allocation in a capital case, had to testify on the merits at the combined guilt and penalty stage of the trial. The Court in \textit{McGautha} recognized that, unlike in \textit{Crampton}, any incrimination which results from the election to present a defense, except in the special case yet to be discussed of the defendant who takes the stand, comes from third persons (that is, from the defendant's witnesses).\textsuperscript{151} Any testimonial input by the defendant is likely to be minimal. In other words, the incriminating evidence supplied by the defendant is evidence which the prosecution could have lawfully obtained without any cooperation from the defendant if it had found the defense witnesses itself—an occurrence which the defendant, in the absence of discovery, may seek to avoid.

Any help afforded the prosecution by the defendant's evidence thus only peripherally affects the policies underlying the privilege. The state treats the defendant fairly (the defendant need not choose between deceit, incrimination or punishable silence) and maintains a fairly balanced adversary system (the defendant has access to any exculpatory evidence presented as part of the prosecution's case).

\textsuperscript{148} \textit{Id.} at 758.

\textsuperscript{149} If the prosecution could not do so, how could it cross-examine the defendant's self-defense witness? The prosecution's logical first question is: you really did see the defendant kill the deceased, did you not? If the prosecution could not do so, what would the judge instruct the jury to do in determining the defendant's guilt or innocence? Must the judge tell the jury to consider only the incriminating evidence presented by the prosecution and not that presented by the defendant? Could a jury realistically follow such an instruction and disregard incriminating evidence presented by the defendant? Surely not.

\textsuperscript{150} 402 U.S. 183 (1971).

\textsuperscript{151} \textit{McGautha}, 402 U.S. at 215-16.
Since the impact on the defendant’s privilege of the election to present defense evidence is so slight, it is permissible, given the strong state interests at stake, for the state to require defendants to suffer a limited loss of their privilege when they present defense evidence. Likewise, the compelled election does not violate the policies underlying the defendant’s sixth amendment right to present witnesses in one’s defense because that right has always been subject to the prosecution’s testing of defense evidence—a testing designed to weaken if not destroy the defendant’s case. Thus, it is not unconstitutional to compel defendants to choose between presenting a defense and not incriminating themselves through disclosing their evidence.

The defenders of the California Supreme Court’s approach might respond that the timing of the defendant’s disclosures is crucial. Pretrial disclosure of incriminating evidence is different because the prosecution can use that evidence, unlike defense evidence first disclosed when the defendant presents it at trial, to satisfy its burden of presenting a prima facie case (that is, of presenting evidence sufficient to survive a motion for judgment of acquittal at the end of the prosecution’s case). While this objection has force, it is still ultimately unconvincing. First, the prosecutor rarely has difficulty proving a prima facie case. The specter of the prosecutor bringing charges unsupported by sufficient evidence to get to the jury in hopes that the defendant will fill the gaps is just that—an unrealistic specter. The defendant’s real concern with respect to incrimination is that the prosecution will use incriminating defense evidence, not to establish a prima facie case, but to accomplish the far more difficult task of convincing the fact-finder of the defendant’s guilt beyond a reasonable doubt. If the privilege against self-incrimination does require the prosecution to establish some sort of prima facie case before expecting the defendant to respond, then the grand jury or preliminary examination should perform that screening task. In most jurisdictions they already do so.

The objection is also unconvincing because the defendant obtains in any case only the most limited review of the sufficiency of the prosecution’s prima facie case. The defendant may move for a judgment of acquittal (that is, a directed verdict) at the end of the prosecution’s case. The motion tests the sufficiency of the evidence presented by the prosecution. If the trial judge denies the motion, the defendant, according to the traditional view, waives or withdraws the motion by presenting defense evidence. Any subsequent review

152. See, e.g., Fed. R. Crim. P. 29; Md. R. 4-324.
153. 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 463 (2d ed. 1982); see also Md. R. 4-324(c) (defendant, by offering evidence, withdraws earlier motion for judgment of acquittal). For criticism of the waiver rule, see Comment, The Motion for Acquittal: A Neglected Safeguard, 70 YALE L.J. 1151 (1961).
of the sufficiency of the evidence to support a conviction, whether conducted upon the defendant's renewal of the motion at the end of all the evidence, upon the defendant's appeal, or upon collateral attack, thus involves a review of all the evidence. In other words, the defendant cannot obtain any review on the correctness of the denial of the initial motion for judgment of acquittal (that is, the motion made at the end of the prosecution's case). At all subsequent reviews for evidentiary sufficiency, the prosecution necessarily enjoys any advantages acquired from discovery of the defendant's evidence. The waiver doctrine thus sharply limits the ability of defendants to challenge the sufficiency of the prosecution's case before they must put on a defense. However, it does have the advantage of focusing the reviewing court's attention on the real basis for inquiry into the sufficiency of the evidence of guilt: is there an unacceptable risk that the convicted defendant is innocent?  

Given the general acceptance (and correctness) of the waiver doctrine, the pretrial (as opposed to trial) disclosure of defense evidence deprives the defendant of very little. The defendant no longer can obtain from the trial judge a ruling on the sufficiency of the incriminating evidence gathered by the prosecution before it discovered the defendant's evidence. That "deprivation" appears to be neither unwise nor unconstitutional. The trial judge's ruling, if adverse to the defendant, was unreviewable in any case.

_Discovery of Additional Information Needed to Test the Defendant's Evidence_

In his _Williams_ dissent, Justice Black invoked the defendant's absolute right to remain silent as a basis for condemning prosecutorial discovery of alibi witnesses. According to Justice Black:

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155. Historically, trial judges also had discretion whether even to rule on the defendant's motion if the defendant reserved the right to present evidence. 9 J. WIGMORE, _supra_ note 36, § 2496. While that rule derives primarily from civil cases, in criminal cases before the mid-nineteenth century no review was available at all on the sufficiency of the evidence to support a conviction. The jury was judge of the law as well as of the facts and could define as it chose the elements of the offense and the evidence needed to establish them. United States v. Sparf, 156 U.S. 51, 64-80 (1895) (federal criminal jury no longer to decide legal questions such as sufficiency of evidence). Concern over the jury's power arbitrarily to convict led to the development of greater judicial control over jury verdicts; there was no concomitant concern about the prosecutor's power to use the defendant's evidence to convict.
The defendant, under our Constitution, need not do anything at all to defend himself, and certainly he cannot be required to help convict himself. Rather he has an absolute, unqualified right to compel the State to investigate its own case, find its own witnesses, prove its own facts, and convince the jury through its own resources. Throughout the process the defendant has a fundamental right to remain silent, in effect challenging the State at every point to: 'Prove it.'

Justice Black's point is both eloquent and in large part correct, but it has no application to cases like Williams in which the defendant does not choose to remain silent but chooses to present evidence in his own defense. This statement applies by its own terms only to cases in which the defendant presents no evidence and simply challenges the prosecution to "prove it." In those cases, the defendant may rely on the presumption of innocence to require the prosecution to prove guilt beyond a reasonable doubt without any help from defense evidence.

Even when the defendant presents no defense, the prosecution may obtain nontestimonial assistance from the defendant (for example, a courtroom identification) and may obtain the benefit of an adverse inference if the defendant fails to produce an available witness or other evidence which one could reasonably expect to benefit the defendant. The former practice is defensible, but the latter may violate the privilege against self-incrimination if applied to cases where the defendant has chosen to assert no defense. Adverse inferences should not result from the defendant's decision to present no defense, but only from the presentation of an incomplete or inherently weak defense.

156. Williams, 399 U.S. at 112 (Black, J., dissenting).
157. The presumption of innocence is really an "assumption" of innocence. See McCormick on Evidence, supra note 62, § 342.
158. The presumption of innocence and the reasonable doubt standard are logical corollaries. Both doctrines require the prosecution to establish guilt beyond a reasonable doubt; the presumption adds that the fact-finder must determine guilt or innocence solely on the basis of the evidence (including, of course, logical inferences that flow from it) adduced as proof at trial. Taylor v. Kentucky, 436 U.S. 478, 484-85 (1978). Neither of these doctrines, however, provides a clear basis for a right not to present a defense. See infra note 162.
160. See supra text accompanying notes 64-80.
161. Adverse comment on the defendant's failure to testify is impermissible. Griffin v. California, 380 U.S. 609 (1965). Adverse comment on the defendant's failure to present an incriminating defense also seems impermissible unless the compulsion to present third party evidence generated by the comment is not as great as the compulsion on the nontestifying defendant to take the stand. In the latter case, the missing witness (the defendant) is visible to the jury. The adverse comment may therefore have more impact on the jury.
162. Stier, Revisiting the Missing Witness Inference, 44 Md. L. Rev. 137, 164-65 (1985). If the defendant presents evidence, there is at least a partial waiver of the privi-

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Once the defendant presents evidence, the situation changes because the defendant is no longer just challenging the prosecution to prove guilt. The prosecution now must do more to secure a conviction than to prove the defendant's guilt; it must also prevent the defendant's evidence from raising a reasonable doubt in the jury's mind on an element of the offense or from establishing any defense on which the defendant has the burden of persuasion. The prosecution has a legitimate interest in fully testing the defendant's evidence to insure that it does not have a greater impact on the fact-finder than it warrants. For this testing to be effective, the prosecution needs access to all information relevant to the defense, including incriminating information which the defendant would prefer not to disclose.

The Federal Rules and the many state discovery rules based on them therefore adopt an unsound, if not incoherent, approach when they condition prosecutorial discovery on the defendant's seeking discovery from the prosecution — rather than on the defendant's choosing to present a defense — and then limit that discovery to the evidence the defendant intends to present at trial. The defendant needs pretrial discovery in all cases because the defendant must always decide how to challenge the prosecution's evidence and what defense evidence if any to present. The defendant should pay no price for exercising discovery rights. The prosecution, on the other hand, needs discovery (other than the limited discovery afforded by the nontestimonial production of tangible things discussed below) only if the defendant chooses to present a defense. Williams upholds the authority of the state to require the defendant to "announce" prior to trial whether he intends to present defense evidence. If the defendant responds affirmatively, that announcement should trigger the prosecution's right to discover all relevant information reasona-

163. See Fed. R. Crim. P. 16(b).
165. "Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense . . . ." Williams, 399 U.S. at 85.
bly needed to test that evidence.

In at least four areas, a considerable body of law has developed affording the prosecution discovery of information which the defendant does not intend to disclose at trial but which the prosecution may find useful as a means to test evidence which the defendant does intend to present.\footnote{166} First, when the defendant takes the stand, the prosecution may obtain through cross-examination information not disclosed on direct examination. Second, when the defendant presents the testimony of a witness other than the defendant, the prosecution may discover any prior statements of the witness relevant to the subject matter of the testimony. Third, when the defendant puts his own mental condition at issue through the presentation of psychiatric testimony, the prosecution may obtain the defendant's testimony on that mental condition. Fourth, when the defendant presents expert psychiatric testimony, the prosecution may discover the names and reports of other psychiatrists retained by the defendant but not called to testify.

The reasoning of these cases thus supports a broader form of prosecutorial discovery than that upheld by Justice Traynor in \textit{Jones}. Not only should the prosecution obtain pretrial discovery of the defendant's evidence, but it should also obtain discovery of information needed to test the defendant's evidence. Indeed, when applied to the facts in \textit{Jones}, these cases support a result contrary to that reached by Justice Traynor: the prosecution should have obtained discovery of the reports of the nontestifying physicians who had treated the defendant in order to rebut the testimony of the treating physicians called by the defendant. Discovery was appropriate to permit the prosecution to test the defendant's medical evidence of impotency.

\section*{Discovery from the Testifying Defendant}

The criminal defendant naturally waives the privilege against self-incrimination on taking the stand, but the scope of the waiver is not free from doubt. Early federal cases defined the waiver narrowly.\footnote{166. This growing, albeit by no means unanimous, body of law recognizes that the privilege against self-incrimination and the other rights of the criminal defendant do not bar prosecutorial discovery of information the prosecutor needs to test effectively the defendant's evidence. Sometimes the prosecutor only obtains discovery at trial of the necessary information because notions of work product (e.g., with respect to statements obtained by counsel from defense witnesses) or considerations of fairness (no one contemplates requiring defendants to disclose the substance of their own testimony until they take the stand after hearing the prosecution's case) may preclude earlier discovery. But discovery at trial is still a form of discovery; and the prosecution may still use the defendant's incriminating disclosures to impeach or rebut a defendant's evidence or, in the case of a defendant's testimony on cross-examination, to establish the defendant's guilt.}

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The court in *Tucker v. United States*, for example, reasoned that compelling a defendant to answer questions outside the scope of the direct testimony violated the privilege. *Tucker* thus allows a defendant to give exculpatory testimony on one element of an offense while avoiding incriminating testimony on another element of the same offense.

Subsequent federal cases are less generous to the testifying defendant, though also less clear. The Supreme Court remains content with the vague rules that the “breadth” of the waiver “is determined by the scope of the relevant cross-examination” and that the defendant cannot claim the privilege on matters “reasonably related to the subject matter of his direct testimony.”

Several commentators have criticized the Supreme Court for tying the scope of the testifying defendant’s waiver of the privilege to the scope of cross-examination in the jurisdiction prosecuting the defendant. These two issues are distinct, and the scope of the defendant’s federal privilege should not vary from state to state nor be dependent on state rules of evidence. In addition, the Court’s application of the federal privilege to the states — a relatively recent event — has raised unanswered questions on the scope of the privilege in states that follow the wide-open rule on cross-examination.

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167. 5 F.2d 818 (8th Cir. 1925). The defendant on direct examination limited his testimony to the denial of one element of the offense charged (the fraudulent nature of his business). He then claimed the privilege when asked on cross-examination about another element (the use of the mails). The trial court compelled the defendant to answer the prosecutor’s question, but the circuit court reversed the conviction.

168. *Id.* at 824. The *Tucker* court was influenced by the fact that the government had no independent evidence of the defendant’s use of the mails.


170. *McGautha v. California*, 402 U.S. 183, 215 (1971). Lower federal courts have construed quite broadly the “subject matter” of direct and the required “relationship” between that matter and the question asked on cross-examination. *McCormick on Evidence*, supra note 62, § 132, at 324; *see also Neely v. Israel*, 715 F.2d 1261 (7th Cir. 1983). Thus, Patty Hearst, after testifying on direct that she had participated under duress in the crime charged (a bank robbery), could not invoke the privilege with respect to her post-crime activities even though her answers to the prosecutor’s questions might help establish her criminal intent. *United States v. Hearst*, 563 F.2d 1331 (9th Cir. 1977). This approach most likely would have produced a different result in *Tucker* because the government surely could have established some connection between the defendant’s placing an advertisement in a newspaper that went through the mails (the subject matter of the prosecutor’s cross-examination) and his fraudulent purpose (the matter put in issue by the defendant’s testimony).


172. For a distinguished opinion so holding, see *Neely v. State*, 97 Wis. 2d 38, 292 N.W.2d 859 (1980).

rather than the federal rule limiting cross-examination to the scope of direct.\textsuperscript{174} Under the Court's present approach, if taken literally, a prosecutor in a wide-open jurisdiction may compel answers to questions that seek information relevant to the charge regardless of any link to the subject matter of direct examination. Wigmore strongly supports that result, arguing that the necessary connection between all relevant facts makes any partial disclosure by the defendant distorting. Thus, the defendant's taking the stand to testify on one relevant fact is a waiver as to all relevant facts.\textsuperscript{175}

The prosecution may also seek the testifying defendant's help in producing relevant documents and tangible things.\textsuperscript{176} The defendant can no longer resist discovery on the ground that the act of production contains implicit testimony on the existence, location and authenticity of the evidence produced.\textsuperscript{177} Thus, if the defendant in \textit{Jones} had testified that an accident seven years previous to the alleged rape had made him impotent, there is no doubt that the prosecution could have obtained from the defendant by trial subpoena any reports in the defendant's possession prepared by physicians who had treated the defendant for the injury.\textsuperscript{178}

\textsuperscript{174} See Carlson, \textit{supra} note 171, at 717-19.

\textsuperscript{175} 8 J. \textit{Wigmore, supra} note 36, § 2276. In defense of Wigmore one might add that an adverse inference seems appropriate if a testifying defendant denies one element of an offense but remains silent on another. An adverse inference is permissible only if the defendant's failure to deny or explain that element is unprivileged. \textit{Caminetti v. United States}, 242 U.S. 470 (1916). Of course, with respect to the second element on which the defendant wishes to remain silent, the defendant does face the trilemma of perjury, contempt, or self-condemnation; but that trilemma seems less cruel when the defendant has already chosen to testify on some relevant matters.

Wigmore's approach magnifies the help which the prosecution may compel from the testifying defendant; but, as cases like \textit{Hearst} demonstrate, the prosecution may obtain considerable help from the defendant even if the compulsion to respond on cross-examination only extends to questions somehow related to the direct testimony. The difference is only one of degree. There are very few cases finding error in the prosecution's cross-examination of the accused. \textit{McCormick on Evidence, supra} note 62, § 132, at 323 n.5. Present law in practice, therefore, does not appear that far removed from Wigmore's position.

\textsuperscript{176} The defendant's waiver of the privilege covers not only testimony from the stand but also the testimonial production of evidence — at least if the evidence sought relates in some fashion to the defendant's direct testimony. See authorities cited \textit{infra} note 177.

\textsuperscript{177} 8 J. \textit{Wigmore, supra} note 36, § 2276, at 474; \textit{McCormick on Evidence, supra} note 62, § 132, at 323. For a recent case so holding, see \textit{United States v. Black}, 767 F.2d 1334 (9th Cir. 1985).

\textsuperscript{178} Quite clearly, the prosecution could also ask the defendant on cross-examination for the names of all the physicians who had treated him for the injury. Likewise, if the defendant in \textit{Hughes} had testified that he had not fired a shot at the victim, there is little doubt about the enforceability against the defendant of a subpoena requiring him to produce all guns registered in his name. The prosecution's interest in testing the truthfulness of the defendant's testimony justifies compelling the defendant to testify fully.
Discovery of Prior Statements of Defense Witnesses

There is little authority on whether the calling of a witness by a nontestifying defendant constitutes a waiver of the privilege against self-incrimination. In practice, the courts do not treat the calling of a defense witness as a waiver of the privilege except in the special case of an expert who testifies on the defendant’s mental condition.\textsuperscript{179} If, for example, the defendant in Jones had called several physicians who testified that they had treated the defendant for an injury that had made him impotent, the prosecution could not compel the defendant’s testimony on the injury or on his present sexual ability.\textsuperscript{180} The prosecution simply does not need the defendant’s testimony, or at least any oral testimony from the stand, to test the defense evidence.\textsuperscript{181}

Nevertheless, if the defendant does call a witness, the prosecution may often obtain some discovery from the witness.\textsuperscript{182} The prosecutor, for example, could question the witness whether the witness previously gave a statement to the defendant, defense counsel, or a defense investigator. The prosecution naturally wishes to uncover any prior statement of the witness that might be useful in impeaching the witness’ trial testimony. If the defense had given the witness a copy of the statement, there is no reason why the court could not compel the witness to produce it. More likely, the witness will not have retained a copy and may even be unaware whether the defense

\begin{footnotesize}
\begin{enumerate}
\item If the defense expert testifies on the defendant’s testimonial responses to a mental examination, the prosecution’s expert must also have access to those testimonial responses for the prosecution adequately to test the defense evidence. Thus, although the prosecution cannot compel the defendant to take the stand in front of the jury, it can compel the defendant to submit to a mental examination by the prosecution’s, or at least by a neutral, expert. In this special case some sort of waiver does take place when the defendant calls the witness. \textit{See infra} text accompanying note 192.
\item That result seems correct because allowing the prosecution to call the defendant as its witness would unfairly tip the balance in the prosecution’s favor and subject the defendant to the cruel trilemma of perjury, contempt or self-condemnation.
\item It is a closer question whether the prosecution may compel the defendant to submit to a physical examination not requiring any testimonial responses. That examination may raise fourth amendment, as well as due process, problems, \textit{see} Winston v. Lee, 105 S.Ct. 1611 (1985) (unreasonable search and seizure medically to remove a bullet from the defendant’s body despite evidentiary value to prosecution of connecting bullet to crime victim’s gun), but it does not appear to raise any fifth amendment problems.
\item For instance, if the defendant in Jones called his treating physicians and introduced reports prepared by them, the prosecution could surely ask the physicians, either pretrial or at trial, to produce any other reports they had prepared on the defendant’s condition. If they had retained copies, the physicians could surely be compelled to produce them; otherwise, the prosecutor could examine them about the present whereabouts of the missing reports and their recollection of their contents.
\end{enumerate}
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made some record of the statement and whether the defense still retains that record.

Can the prosecution obtain discovery from the defendant of the witness' prior statement? The witness' prior statement may incriminate the defendant because there may be inconsistencies between the witness' exculpatory trial testimony and the prior statement. The prosecution, upon discovery of the statement, may utilize those inconsistencies to impeach the witness' trial testimony and thus demolish the defendant's defense. Such a use is an incriminating use, but the incriminating testimony is nevertheless the prior statement of the witness and not any testimony of the defendant. In United States v. Wright, the court nevertheless found testimony by the defendant in the act of production. In producing a prior statement by a defense witness, the defendant impliedly testifies that the statement exists, is in the defendant's possession, and is authentic. The trial court therefore may not require the defendant to produce it.

There are troubles with the Wright court's analysis, not the least of which is that the Supreme Court subsequently ignored it. In United States v. Nobles, a case with strikingly similar facts, an unanimous Court held that compelled production of the prior statement by a defense witness did not violate the defendant's privilege because the privilege was personal. The fact that the statements of third parties elicited by the defense investigator and recorded by him might incriminate the defendant was irrelevant. “Requiring their production from the investigator . . . would not in any sense compel

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183. The California Supreme Court relied exclusively on the incriminating nature of the use when it recently held that a state criminal defendant's state constitutional privilege against self-incrimination permitted the defendant to refuse disclosure of prior statements by defense witnesses. In re Misener, 38 Cal. 3d 543, 698 P.2d 637, 213 Cal. Rptr. 569 (1985).
185. Id. at 1193 n.15.
186. 422 U.S. 225 (1975). In Nobles the government obtained discovery of a defense witness' prior statement after the defense witness had testified at trial. The Court held that the defendant had waived the work product privilege by electing to call the witness. Id. at 236-40. In jurisdictions in which defendants must disclose prior to trial which witnesses they will call, some courts have held that the defendant may claim work product protection for a witness' prior statements until the witness actually testifies at trial. George v. State, 397 N.E.2d 1027 (Ind. App. 1979). The George case was followed in Spears v. State, 272 Ind. 634, 401 N.E.2d 331, on rehearing, 272 Ind. 647, 403 N.E.2d 828 (1980). Prior to that time the prosecution should obtain its own statement from the witness if it wants to know what the witness has to say. In a growing number of jurisdictions, however, work product only protects an attorney's mental impressions and trial strategies and not third party statements. In these jurisdictions, pretrial discovery is available of both the identity and prior statements of defense witnesses. Commonwealth v. Paszko, 391 Mass. 164, 461 N.E.2d 222 (1984) (court rule limits work product doctrine to mental impressions of attorney and excludes witness statements); State v. Hardin, 558 S.W.2d 804 (Mo. Ct. App. 1977).
187. In both Wright and Nobles the defense witness was a defense investigator who sought, among other things, to impeach the credibility of the prosecution's witnesses.
respondent [the defendant] to be a witness against himself or extort communications from him. 188

The Nobles Court made no mention of the doctrine of testimonial production invoked by the Wright court. This omission is surprising since the Supreme Court’s revival of that doctrine followed next term in Fisher. Was the omission due to the Court’s belief that testimonial production was absent, or that even if present, it was irrelevant? The answer to this question may affect the validity of other kinds of prosecutorial discovery.

The Nobles Court viewed the defense investigator as the producer of the prior statement (that is, the Court viewed the situation as similar to where the prosecution asks a physician who had treated the defendant to produce a medical report from office files). This view of the case is unrealistic. Plainly the defendant, through his counsel, had control over the report; there was no indication that the investigator even retained a copy. 189 In Wright, on the other hand, the prosecutor’s first question in cross-examining the defense investigator was to ask the investigator to produce his report. The prosecutor plainly expected the investigator to produce it, but the court analyzed the demand as one directed to the defendant.

The Wright analysis of the facts is more realistic. The defense investigator, as well as the defense attorney, are agents of the defendant; and demands directed to them are demands directed to the defendant. Surely the Nobles Court did not mean to limit its holding to


189. The dissenting opinion in the Court of Appeals, the opinion which reached the same result as the Supreme Court, made plain that the investigator’s report was under the control of defendant’s trial counsel. The court noted that defense counsel had the investigator’s report at times physically in his hands when he was examining a witness and otherwise in his desk at the trial table. United States v. Brown, 301 F.2d 146, 159 (9th Cir. 1974) (Kilkenny, J., dissenting), rev’d, 422 U.S. 225 (1975).
the unusual situation where the defense witness still had some control over the prior statement. The holding must also cover — if it is to be meaningful at all — cases in which the defense witness (for example, an eyewitness) does not have a copy of the statement and does not know for certain whether the defendant does. In these situations, the prosecution necessarily addresses its discovery demand directly to the defendant.

*Nobles* therefore makes sense only on the assumption that there was an act of testimonial production by the defendant. However, that “testimony” was not sufficient to bar prosecutorial discovery. It was not sufficient because, as the Court recognized, the “investigator's contemporaneous report might provide critical insight into the issues of credibility that the investigator’s testimony would raise.”

Given the importance of the report for testing the defendant’s evidence, the defendant could not resist production on the ground of privilege. Some waiver of the privilege therefore accompanied the defendant's presenting the testimony of his investigator. While that waiver did not permit the prosecution to question the defendant on the witness stand, it did permit the prosecution to obtain acts of testimonial production.

In many cases such “testimony” will be of considerable assistance to the prosecution because it will be unaware, or at least uncertain, about the existence of prior statements and would have difficulty authenticating them if it found them lying on the street. Even when these difficulties are absent, the courts have in other contexts recognized a claim of privilege when the act of production, as opposed to the contents of the document, told the prosecution very little. The defendant's production of the prior statements of defense witnesses may tell the prosecution a great deal, but *Nobles* nevertheless holds that the defendant may be compelled to produce those statements to permit the prosecution adequately to test the credibility of the witnesses.

**Discovery from Defendant Who Offers Expert Testimony on Mental Condition**

In at least one context the courts have treated the defendant's calling of a defense witness as a partial waiver of the privilege

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190. *Nobles*, 422 U.S. at 232.
191. Thus, a doctor can raise a claim of privilege in response to a grand jury subpoena for medical records despite the fact that most doctors maintain medical records in their offices and despite the government's ability to authenticate the subpoenaed records through the testimony of the doctor's secretary or some other third party. Absent a further showing that the government knows that the doctor subject to the subpoena possesses the records sought, the act of production is privileged because it tells the government something incriminating which it does not know about the existence of the records. United States v. Fox, 721 F.2d 32 (2d Cir. 1983).
against self-incrimination justifying further discovery from the defendant. That context is where the defendant presents the testimony of a psychiatrist or other mental health expert on the defendant's mental state. The "waiver by offer of psychiatric evidence" doctrine permits the prosecution to compel potentially incriminating testimony from the defendant on the mental state that the defendant put at issue. This waiver doctrine does not depend on any knowing and intelligent choice by the defendant to forgo claiming the privilege against self-incrimination but represents a conclusion based on policy grounds that the defendant's presenting of expert psychiatric testimony results in a limited forfeiture of fifth amendment protection.

The waiver doctrine has had its most frequent application in the context of insanity and related defenses where the courts have invoked it to uphold a compulsory mental examination of the defendant. Court rules often require defendants to give advance notice if they intend to rely on an insanity defense or to introduce expert testimony on mental condition. Once a defendant gives such notice, the court may order the defendant to submit to a mental examination by a psychiatrist chosen by the court or the prosecutor.

Responses by the defendant to the court-appointed psychiatrist's questions may be both testimonial and incriminating. The Court has held that the responses are testimonial if the psychiatrists base their trial testimony on the "substance" of the disclosures made by the defendant. Although the Court did not further elucidate, the explanation for its holding must be that the "substance" of the defendant's utterances, which tell us something about mental condition, are products of the defendant's choice; while the defendant's blood or handwriting, which tell us something about physical condition or identity, are matters over which the defendant has no control. It is the defendant's capacity to deceive, or at least attempt to deceive,

192. The defendant may present that testimony (hereinafter referred to as psychiatric testimony) to support an insanity defense, a claim of diminished capacity, a denial that the defendant acted with the necessary mens rea, or to establish the presence of mitigating circumstances at sentencing.


194. Id. at 949; see also United States v. Byers, 740 F.2d 1104, 1113 (D.C. Cir. 1984) (en banc).

195. See, e.g., FED. R. CRIM. P. 12.2.

that makes statements to the psychiatrist testimonial.\(^{197}\)

The defendant's statements to a court-appointed psychiatrist may incriminate the defendant in either of two ways: the defendant may admit to the examining psychiatrist the commission of the acts charged; or the examining psychiatrist may conclude from the defendant's statements that the defendant was sane or had the requisite mental state required for the commission of the offense. Court rules\(^{198}\) or case law\(^{199}\) usually grant the defendant use immunity which eliminates the danger of incrimination in the first situation (that is, incrimination on the issue of the defendant's guilt other than with respect to the mental state which the defendant has put in issue). The danger of incrimination in the second situation, however, is real and substantial because the purpose of the compulsory mental examination is to permit the prosecution to test, and destroy if possible, the defendant's defense. The defendant's statements are incriminating if the prosecution can use them to eliminate an insanity or related defense and thus obtain a conviction.\(^{200}\)

The justification for the compulsory mental examination is the prosecution's legitimate interest in testing the truthfulness of the defendant's psychiatric testimony through cross-examination and rebuttal evidence. Cross-examining the defense psychiatrist does not provide sufficient testing because the critical testimony is not the psychiatrist's but the defendant's testimony to the psychiatrist.\(^{201}\) In addition, effective rebuttal of psychiatric opinion testimony normally requires contradictory opinion testimony by experts who have access to the same information.\(^{202}\) Thus, the maintenance of a fair state-

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197. The Smith Court did mention that the psychiatrist's courtroom testimony "resembled respondent made, and remarks he omitted, in reciting the details of the crime." Id. at 464. The fact that defendant's "recitations" included details of the crime seems irrelevant. What is relevant (as the Court's wording indicates) is the matters "made" or "omitted" by the defendant.

198. The Federal Rules provide that the defendant's statements and the fruits thereof are inadmissible "except on an issue respecting mental condition on which the defendant has introduced testimony." Fed. R. Crim. P. 12.2(c).

199. Gibson v. Zahradnick, 581 F.2d 75 (4th Cir. 1978) (federal constitution bars state from conditioning insanity plea on defendant's waiver of privilege on issue of guilt). Compare the federal cases cited in Gibson which were decided prior to the enactment of Rule 12.2(c), and which reach the same result as a matter of federal common law.

200. United States v. Byers, 740 F.2d 1104, 1113 (D.C. Cir. 1984) (en banc). In Byers, the court-appointed psychiatrist testified, with devastating effect, that the defendant had admitted to him that his claim of supernatural influences affecting his mind at the time of the killing only occurred to him long afterwards.

201. Byers also rejected as wrong in principle, and no longer viable after Smith, earlier cases holding that testimony establishing sanity was not incriminating. Id. at 1112. In Estelle v. Smith, 451 U.S. 544 (1981), the Court held that testimony was incriminating if it subjected the defendant to more severe punishment at sentencing. For a more recent case still treating evidence establishing the defendant's sanity as not incriminating, see State v. Craney, 347 N.W.2d 668, 673 (Iowa 1984).

202. White, supra note 193, at 961.
individual balance, fundamental fairness to all the parties, and judicial common sense combine to legitimize prosecutorial discovery of the defendant's mind when the defendant puts his mental state in issue.\textsuperscript{203} That discovery does not include compelling the defendant to testify before the fact-finder but it does include, unlike other forms of permissible prosecutorial discovery, compelling the defendant to furnish potentially incriminating oral testimony.

The case law reflects, albeit not so clearly, an additional limitation on this form of prosecutorial discovery. The waiver doctrine should not apply whenever the defendant introduces psychiatric testimony but only when a defense psychiatric expert testifies on the basis of testimonial responses obtained from the defendant. Psychiatric experts normally base their evaluation of an individual's mental state on an examination or interview that includes questions requiring testimonial responses. However, it is possible for psychiatrists who have not examined a defendant to testify so long as they have some other basis for reaching a judgment on the issue before the court.\textsuperscript{204} In such cases, the prosecution does not have the same need for testimonial responses from the defendant to test effectively the defendant's psychiatric evidence. The prosecution should have access to the defendant's testimonial responses only if defense psychiatrists base their conclusions, in whole or in part, on an examination of the defendant. This limitation explains why the prosecution should have that access even if a compulsory mental examination of the defendant is not indispensable to the prosecution but only enhances its ability to test the defendant's evidence. If an expert's testifying for the defense has obtained the benefit of testimonial responses from the defendant, fairness requires that there be an expert available to the prosecution who has received the same access.\textsuperscript{205} Otherwise there will be no fair state-individual balance in the adversary system.\textsuperscript{206}

\textsuperscript{203} Id. at 1113.
\textsuperscript{204} See White, supra note 193, at 944 n.5 and authorities cited therein.
\textsuperscript{205} As the court explained in Battie v. Estelle: "By introducing psychiatric testimony obtained by the defense from a psychiatric examination of the defendant, the defense constructively puts the defendant himself on the stand and therefore the defendant is subject to psychiatric examination by the State in the same manner." 655 F.2d 692, 702 n.22 (5th Cir. 1981).
\textsuperscript{206} The validity of this conclusion should not depend on the allocation of the burden of proof on the defendant's sanity or other mental condition. Some of the earlier federal cases upholding compulsory mental examinations did emphasize the government's need, once the defendant introduced some evidence on sanity, to obtain psychiatric testimony to satisfy its burden of proving sanity beyond a reasonable doubt. United States v. Cohen, 530 F.2d 43 (5th Cir. 1976); United States v. Albright, 388 F.2d 719 (4th Cir. 1968). Congress has now acted to require the defendant to prove insanity by clear and
Prosecutorial discovery under the waiver by offer of psychiatric testimony doctrine is subject to one further limitation not applicable to other types of prosecutorial discovery. This limitation requires that any evidence obtained by the prosecution be admissible only on the issue of the defendant’s mental condition. Thus, the prosecution cannot use the results of a compulsory mental examination to establish, for example, that the defendant killed the homicide victim, did not shoot in self-defense, or satisfied any element of the crime charged other than mental condition put in issue by the defendant. Other evidence discovered by the prosecution (for example, the defendant’s alibi or self-defense witnesses) is not, at least under the thesis advocated in this Article, subject to that limitation and may be used by the prosecution to establish any facet of the defendant’s guilt.

The explanation for this difference lies in the broader discovery available under the waiver by offer of psychiatric testimony doctrine. That doctrine permits the prosecution not only to discovery evidence which the defendant does not intend to disclose at trial, but also to obtain that evidence by interrogating the defendant in the absence of counsel. The interrogator is free to inquire into the prior deviant conduct of the defendant, including any participation in the crime charged. Indeed, the defendant’s description of the scope of that participation usually provides the interrogator with the most reliable evidence for reaching a conclusion on the defendant’s mental state at that time. Thus, for the defendant to cooperate fully in the examination, and preserve the right to present psychiatrist testimony, the defendant may need to confess to the acts charged. If the prosecution could use such a confession to a court-appointed psychiatrist to establish guilt, then the defendant’s plea of insanity would be the convincing evidence. See Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, § 401, 98 Stat. 2057 (codified as 18 U.S.C. § 20 (Supp. II 1984)). This change in the burden of proof should not affect the government’s discovery rights. Prosecutorial discovery serves dual purposes: to permit the prosecution to prove its case (arguably no longer applicable if the defense must prove insanity) and to permit the prosecution to test or rebut the defendant’s case. The latter purpose of discovery — which recognizes that discovery is an essential ingredient of the adversary system — remains intact even if the defendant must prove insanity by clear and convincing evidence. The prosecution still has a legitimate interest in testing the defendant’s case.

207. See authorities cited supra notes 198-99.
208. See supra text accompanying notes 138-41.
209. See United States v. Byers, 740 F.2d 1104 (D.C. Cir. 1984) (en banc), and the many cases cited therein. The Supreme Court had earlier recognized the defendant’s constitutional right to obtain advice from counsel before requesting or submitting to a psychiatric examination. Estelle v. Smith, 451 U.S. 454, 469-71 (1981).
211. It is well established that the trial court may preclude the testimony of a defense psychiatric expert if the defendant refuses a court-ordered examination designed to permit the prosecution to test the defendant’s evidence. The lead case is State v. Whitlow, 45 N.J. 3, 210 A.2d 763 (1965) (Francis, J.).

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equivalent of a guilty plea.

Court rules\(^{212}\) and judicial decisions\(^{213}\) have avoided that result by treating the waiver that accompanies the defendant’s offer of psychiatric testimony as a limited waiver authorizing the prosecution to use the fruits of a compulsory mental examination only to establish that the defendant had the mental state at issue. At least two decisions suggest that so limiting the defendant’s waiver is constitutionally required. In *Gibson v. Zahradnick*,\(^{214}\) a murder defendant’s counsel sought and obtained a court order for a psychiatric examination on the defendant’s competency to stand trial and sanity at the time of the crime.\(^{215}\) The court reasoned the state could not condition the defendant’s right to an examination on competency and sanity upon a waiver of the privilege of self-incrimination on all elements of guilt.\(^{216}\) Shortly before *Gibson*, *Collins v. Auger*\(^{217}\) had reached the same result on due process grounds.

The results in *Gibson* and *Collins*, while supportable, are not without their difficulties. Although responses by the defendant during a mental examination and conclusions made by the examiner thereon are admissible only on the issue of the defendant’s mental condition, a similar limitation does not apply to questions posed by the examiner. As conceded by the court in *Gibson*, the defendant’s description of his activities at the time of the crime, including any participation by him in the crime, are of great interest to the examining psychiatrist; and the psychiatrist, in testifying on the issue of the defendant’s mental condition, may find it necessary to disclose any criminal activity related by the defendant.\(^{218}\) In addition, even if the psychia-

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\(^{212}\) See Fed. R. Crim. P. 12.2(c).


\(^{214}\) 581 F.2d 75 (4th Cir. 1978).

\(^{215}\) The examination took place at a state mental hospital. At trial, the prosecution called the examining psychiatrist to establish that the defendant shot the victim. The court found a violation of the privilege against self-incrimination even though the trial court had not compelled the defendant to undergo a psychiatric examination but the defendant had sought the examination in his own defense.

\(^{216}\) *Gibson*, 581 F.2d at 80. In other words, the state had forced an unacceptable choice on the defendant: either you forgo your right to obtain expert psychiatric testimony in support of an insanity defense or you testify fully on the crimes charged. The state therefore could not insist on a full waiver of the privilege as a price of presenting psychiatric testimony on insanity.

\(^{217}\) 577 F.2d 1107 (8th Cir. 1978).

\(^{218}\) *Gibson*, 581 F.2d at 79. Chief Judge Haynsworth believed that prompt and strong cautionary instructions would prevent the jury from considering the defendant’s admissions on the issue of guilt. *Id.; see also* Watters v. Hubbard, 725 F.2d 381 (6th Cir. 1984) (defendant entitled to cautionary instruction but court need not have acted sua sponte when a defense psychiatrist testified on cross-examination that defendant admit-
tist does avoid testifying on the defendant's admissions of guilt, it is
difficult to ensure that the prosecution does not use that information
to strengthen its case. For example, in the absence of any transcript
of the psychiatric examination, defense counsel has no way of knowing
whether an admission by the defendant led the prosecution to a
missing eyewitness.219

These difficulties in effectuating the use immunity which accompa-
nies a limited waiver of the privilege suggest that it would be unde-
sirable to apply the limitation elsewhere. Other information discov-
ered from the defendant should be fully usable by the prosecution.
Prosecutorial discovery at a compulsory mental examination is
unique because the defendant must undergo the equivalent of custo-
dial interrogation without the presence of a lawyer or even a friend.
Even if the defendant requests the examination, the examining psy-
chiatrists, particularly if they are court-appointed rather than re-
tained and paid by the defendant, may view their role as that of a
neutral expert rather than a member of the defense camp.220 Such
conditions may be necessary to assure that the prosecution obtains
adequate access to the defendant's mental state. However, fairness to
the defendant requires that testimony obtained from the defendant
under those conditions be used by this adversary only to establish the
mental state which the defendant has put in issue (that is, to test or
rebut the defendant's psychiatric evidence). The defendant deserves
such assurance before undergoing a psychiatric examination; and the
prosecution should prove independently the other elements of the de-
fendant's guilt rather than relying on any confession by the defend-
ant to the psychiatrist.

Discovery from Defendant Who Presents the Testimony of an
Expert or Other Witness

The defendant's decision to call a psychiatric or other expert wit-
tness also permits the prosecution, in a growing number of jurisdic-
tions, to compel the defendant to disclose the identities of other ex-
erts known to the defendant who have knowledge of relevant

219. For a fuller description of the problems raised by the illicit prosecutorial use
of the defendant's admissions of guilt, see White, supra note 193, at 965-76.
220. In some jurisdictions, court-appointed psychiatrists (the only psychiatrists
available to indigent defendants) are "disinterested experts" whose reports are available
both to the defendant and to the prosecution. See Tex. Stat. Ann. art. 46.03 (Vernon
1978); Granviel v. Estelle, 552 S.W.2d 107 (Tex. Crim. App. 1976) (upholding the
Texas statute). In these jurisdictions it does not really matter whether the defendant or
the prosecution seeks the examination because the examiner is disinterested and the re-
results are available to both sides. For instance, an indigent defendant with a colorable
claim of insanity has a due process right to psychiatric assistance, Ake v. Oklahoma, 105
S. Ct. 1087 (1985), but that right may not include a confidential report from a friendly
psychiatrist of one's choice. Id. at 1101-02 (Rehnquist, J., dissenting).
information but whom the defendant does not intend to call at
trial. In these cases the compelled disclosures do not involve any
oral testimony by the defendant but are at most acts of testimonial
production (that is, the production of the nontestifying expert’s name
and report).

This type of prosecutorial discovery should not be limited to cases
in which the defendant calls an expert witness. Indeed, the justifica-
tion for such discovery may be greater with respect to other defense
witnesses such as alibi witnesses because the work product doctrine
normally bars one party from calling another party’s unused ex-
erts. A party has no such proprietary right with respect to other
potential witnesses known to the party.

Compelling a defendant who chooses to stand mute to disclose the
identity of a witness whose testimony might help to convict most
likely violates the privilege because the defendant’s identifying the
witness constitutes incriminating testimony by the defendant. Al-
though defendants cannot base a claim of privilege on the potentially
incriminating testimony of the witness, they can invoke the privilege
to avoid producing a witness unknown to the prosecution. The
defendant’s disclosure of the witness is an act of testimonial produc-
analogous to the production of documents or tangible things. Under
Fisher, the prosecution cannot compel the defendant to acknowledge
the existence and whereabouts of a witness unless those matters are
“foregone conclusions.”

221. A defendant will not call a particular expert usually because the nontestifying
expert’s report is unhelpful to the defense, if not downright incriminating.
222. Parties must retain their own experts unless exceptional circumstance justify
the discovery and use of an expert retained by another party. Fed. R. Civ. P.
26(b)(4)(B).
223. Take the case of the defendant who, in a notice of alibi, states that he was at
a given address at the time of the alleged crime and that he intends to rely on the testi-
mony of Jane Doe to establish that alibi. Most notice of alibi rules require no more in the
way of disclosure. See, e.g., Fed. R. Crim. P. 12.1. In investigating the alibi, the prosecu-
tion learns that Doe will testify that at the time of the crime she and seven or eight
others (including the defendant) were playing poker at the given address. Doe refuses to
identify the other participants, or identifies them in a fashion (e.g., by supplying nick-
names only) that makes it impossible for the prosecution to locate them. Should not the
prosecution be able to discover from the defendant the names and addresses of the other
poker players, if known to the defendant? In other words, should not notice of alibi rules
require the defendant to disclose the names of all persons at the scene of the alibi and not
just those persons on whom the defendant intends to rely to establish the alibi? Of
course, the testimony of the other poker players may “incriminate” the defendant by
destroying his alibi (i.e., by testifying that the defendant was not present at the game).
224. Justice Traynor so held in Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d
919, 22 Cal. Rptr. 879 (1962).
225. Fisher, 425 U.S. at 411. The Court has not resolved whether the defendant's
But is not the situation different if the defendant has chosen to present an alibi witness, or perhaps even a self-defense witness? Does the privilege shield the defendant's presentation of a distorted and perhaps untruthful defense? Should not the court treat the defendant's calling a witness as a limited waiver of the privilege which justifies requiring the defendant to produce the names and reports of other potential witnesses? If Nobles, correctly understood, authorizes compelling, when the defendant calls a witness, some acts of testimonial production (that is, the production of the witness' prior statements), then it is logical to require other acts of testimonial production (for example, the production of the names and reports of persons whom the defendant does not intend to call at trial), so long as the prosecution needs that discovery, as it needed the discovery afforded in Nobles, adequately to test the defendant's evidence.

There is a lack of authority to support the above position. However, it seems appropriate that some limitation on the defendant's privilege should accompany the presentation of a defense witness. At the very least, the fact-finder should be able to draw an adverse inference from the defendant's unexplained failure to produce a missing witness whose testimony, if the fact-finder believes the witnesses whom the defendant did call, one would expect to be favorable to the defendant. The drawing of such an inference, which courts would most likely permit under these circumstances, is of questionable constitutionality if the defendant's failure to produce the witness were privileged.

When the defendant presents a selected or truncated version of the facts, the prosecution deserves more than the benefit of an adverse inference which the fact-finder may or may not draw. The prosecution deserves, at least if it affords reciprocal discovery, an opportu-

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226. See supra text accompanying notes 186-88.
227. See supra note 36, § 2273.
229. On an alibi defense, for example, for defense discovery to be fully reciprocal,
nity to put before the fact-finder all the relevant evidence on the issues raised by the defense evidence. To do so the prosecution may need some help from the defendant. While it does not seem appropriate or necessary to permit the prosecution to question or otherwise obtain oral testimony from the defendant, it does seem appropriate to require the defendant through counsel to make the disclosures necessary to permit the prosecution to test the defendant's evidence.

Imposing such a requirement, at least with respect to alibi witnesses, does not seem to violate the policies behind the privilege. The defendant does not face the cruel trilemma of perjury, contempt, or self-condemnation. He may remain silent if he chooses. But if he chooses to advance a defense such as an alibi defense, he must make a complete disclosure of relevant information. Obligating a defendant to do so does not upset a fair state-individual balance because the prosecution cannot be expected to shoulder the burden of gathering evidence independently to rebut evidence selected and controlled by the defendant.

Thus, a requirement that the defendant produce the "missing" alibi witness, although not justified under the Williams acceleration rationale, still does not constitute compulsion in violation of the privilege. The disclosure requirement is a reasonable condition imposed on the defendant's presenting the testimony of an alibi witness: the defendant must choose between presenting no defense and presenting a defense which the prosecution may effectively test. That choice does not impermissibly force the defendant to choose between the sixth amendment right to call witnesses and the fifth amendment privilege against self-incrimination because the state has a legitimate interest in testing the defendant's evidence and any testimonial incrimination by the defendant is slight. The choice imposed on the

it should include more than the prosecutorial disclosure, as provided by Federal Rule 12.1, of alibi rebuttal witnesses. Defendants should also obtain discovery (as they do under many state rules, see FLA. R. CRIM. P. 3.220(a)(1)(i), but not under the more restrictive Federal Rule 16) of all persons known by the prosecution to have been at the scene of the crime. The defendant should be able to fully test the prosecution's evidence of presence at the crime scene.

230. In contrast, see the exceptional case of a defense psychiatric expert who testifies on the basis of testimonial responses obtained from the defendant, discussed supra note 192 and accompanying text.

231. In the hypothetical presented in note 223 supra, for example, counsel may present the testimony of alibi witness Jane Doe, assuming counsel does not believe the testimony to be perjured, only if the defendant discloses to the prosecution the identities of the other poker players not called by the defendant because they do not remember the defendant's participation in the game.
defendant is analogous to the choice a defendant must make in determining whether to take the stand in support of an alibi defense.232

The above argument has greater force in the context of an alibi defense than with respect to other defenses because alibi evidence is uniquely within the control of the defendant: the defendant designates the place of the alibi. However, defenses based on the defendant's mental condition pose similar problems for the prosecution and, unlike the alibi defense, have generated a body of case law supporting the discovery of unused defense evidence. In State v. Dodis,233 for example, the Minnesota Supreme Court upheld a court rule which required a defendant who raised the defense of mental illness to furnish the prosecution (subject to judicial screening for relevance) "all medical reports and hospital and medical records previously or thereafter made concerning the mental condition of the defendant . . . ."234 Under this provision, the medical expert appointed by the court to examine the defendant had access to all relevant information on the defendant's prior history of mental illness—an advantage not shared by examining psychiatrists in other jurisdictions who must rely on what the defendant chooses to give them.235 The Minnesota provision permits the prosecution to "use" that information to rebut the insanity defense.236

The Dodis court interpreted the court rule to require defense disclosure, and permit prosecution use, of all medical examinations and reports (not only pre-crime examinations for treatment purposes, but also post-crime examinations arranged by defense counsel for litigation purposes).237 The court also held that the rule as applied did not violate any constitutional right of the defendant but gave "the defendant and prosecution as complete use of evidence as is possible

232. On cross-examination, the prosecution may ask the defendant to identify the other poker players and explain why they were not called as defense witnesses. If the defendant identifies the other players, the prosecution may call them as rebuttal witnesses. Defendant's refusal to identify them surely would not be privileged but would subject the defendant to adverse inferences, contempt sanctions, and perhaps even the striking of the defendant's testimony. United States v. Panza, 612 F.2d 432 (9th Cir. 1980) (striking of defendant's testimony upheld when defendant improperly invoked privilege on stand).

233. 314 N.W.2d 233 (Minn. 1982).

234. MINN. R. CRIM. P. 20.03(1).

235. The information actually used by the prosecution in Dodis was the testimony of a psychiatrist retained by defense counsel to examine the defendant prior to any court-ordered examination. When the defendant decided not to call the psychiatrist (the defendant presented only his own testimony in support of the mental illness defense), the prosecution called him as a witness for the state.

236. Drafters' Comment, 49 MINN. STAT. ANN. 312 (1979) and 98-99 (1985 Supp.). Any reports or records produced by the defendant were admissible "only upon the issue of the defense of mental illness." MINN. R. CRIM. P. 20.02(2).

237. The prosecution therefore had a right to call as its witness the psychiatrist initially retained by defense counsel.
under constitutional limitations to enhance the search for truth." \(^{238}\)

While the *Dodis* court's reasoning, especially on the constitutional issue, is rather thin, the result reached seems correct. The prosecution's appropriation of unused defense evidence does not violate either the defendant's privilege against self-incrimination or right to the effective assistance of counsel. In *Dodis*, the court focused on the latter right because the prosecution was not seeking the identity of the defense psychiatrist; the defendant had already disclosed the psychiatrist's identity, presumably when the court-appointed a psychiatrist selected by the trial judge to examine the defendant and authorized the defense psychiatrist to observe that examination. \(^{239}\) But the reasoning adopted by *Dodis* for rejecting the defendant's right to counsel claim applies equally as well to any self-incrimination claim. In addition, the validity of any claim of privilege should not depend on whether the defendant "voluntarily" disclosed the identity of the defense-retained psychiatrist at some point in the process.

A number of courts have held that the attorney-client privilege covers communications from a defendant to a psychiatrist retained by the defendant's counsel to aid counsel in advising the client on what defenses to raise. \(^{240}\) Other courts have chosen not to recognize such a privilege \(^{241}\) or, more commonly, have held that the defendant waives the privilege in pleading insanity or presenting psychiatric evidence. \(^{242}\) A leading commentator has likewise argued against the use of the privilege to suppress the results of a defense psychiatric examination on the ground that results of such an examination are likely to be more probative than the results of a court-ordered examination. \(^{243}\) Not only is the defendant likely to be more cooperative

\(^{238}\) *Dodis*, 314 N.W.2d at 241.

\(^{239}\) *Minn. R. Crim. P.* 20.02(2) (authorizing defense-retained psychiatrist to observe any court-ordered mental examination).


\(^{242}\) *People v. Edney*, 39 N.Y.2d 620, 350 N.E.2d 400, 385 N.Y.S.2d 23 (1976); *State v. Carter*, 641 S.W.2d 54 (Mo. 1982) (en banc) (court emphasized the need to supply the fact-finder with every bit of available evidence touching the issue for it to render an intelligent, fair and just verdict on the defendant's mental responsibility); *State v. Noggle*, No. 3-78-2 (Ohio Ct. App. 1978); see also *Dodis*, 314 N.W.2d at 240 (any other result would suppress evidence the jury needs to know for just determination).

\(^{243}\) Saltzburg, Privileges and Professionals: Lawyers and Psychiatrists, 66 Va. L.
with the defense psychiatrist, but that examination is likely to precede any court-ordered examination. Thus, the defense psychiatrist has access to the defendant's mind closer in time to the crime and before the defendant has had the benefit of a dry run of a prior psychiatric examination. The fact-finder therefore should have access to that information if the defendant puts his mental condition at issue.

Courts that have addressed the constitutionality of so restricting the attorney-client privilege have uniformly upheld its constitutionality. The federal courts have emphasized the importance of allowing the states to develop new approaches to testimonial privileges and have refused to constitutionalize any particular version of the attorney-client privilege. State courts, on the other hand, have emphasized policies of openness and fairness in holding that the effectiveness of counsel does not depend on counsel's ability to shroud investigations in secrecy.

The right to effective counsel may require that defense counsel be able to investigate possible defenses before committing the defendant or to retain an undisclosed expert as an aide to the defense camp rather than as a witness. Those techniques may be essential to the effective functioning of defense counsel, but it is absurd to suggest that counsel's effectiveness also depends on the ability to present a defense witness without disclosing to the prosecution that several rejected defense witnesses would give less favorable testimony. At the very least, courts should not strike down, as violating the defendant's right to effective counsel, procedural rules requiring such disclosures. The sixth amendment guarantees the defendant effective counsel under existing rules and does not afford the defendant any right to change the rules so that counsel can function more to the advantage of the defense. If the rules favor unfairly one side, that imbalance poses due process problems but does not render counsel ineffective.

Rev. 597, 634-42 (1980).


Two cases, United States v. Alvarez, 519 F.2d 1036, 1046 (3d Cir. 1975), and State v. Pratt, 284 Md. 516, 519, 398 A.2d 421, 423 (1979), have suggested in dicta that the attorney-client privilege, besides having a common-law basis, has acquired constitutional significance.

245. See cases cited supra note 244, first paragraph.

246. State v. Craney, 347 N.W.2d 668 (Iowa 1984); State v. Carter, 641 S.W.2d 54 (Mo. 1982) (en banc).

Dodis did not directly involve the defendant's privilege against self-incrimination because the prosecution did not need to ask the defendant to produce any unused evidence. The prosecution already had access to the defense psychiatrist. In State v. Carter, on the other hand, the trial judge ordered the defendant to produce the report of a psychiatrist employed by the defendant to examine the defendant's mental condition at the time of the crime, but whom the defendant had decided not to call in support of his insanity defense. The defendant produced the report and the psychiatrist testified for the prosecution. The court upheld the trial judge's action because the defendant had waived the privilege against self-incrimination when he pleaded insanity.

In Carter, the prosecution already knew the name of the defense psychiatrist and only sought production of the report. Arguably, the defendant's act of production was not testimonial because the existence and the defendant's possession of the report were foregone conclusions and because the psychiatrist could authenticate the report. Most likely the prosecution could have obtained the report at trial, but not during discovery, if it had simply subpoenaed the psychiatrist to testify and to bring along the report.

The result, however, should be the same in cases in which the defendant's disclosures are more helpful to the prosecution (that is, where the prosecution does not know the identity of the defense psychiatrist and the defendant in effect tells it: here is the name of a psychiatrist who might help you). If pleading insanity makes unused defense evidence on the defendant's mental condition available to the prosecution, it should do so in all cases and not just where the defendant is sufficiently unlucky or poor to be unable to conceal from the prosecution the identity of a defense psychiatrist. Wealthy defendants may shop at their leisure for favorable psychiatric testimony without attracting the prosecutor's attention; poor defendants do not enjoy that benefit because they must seek court orders to pay

248. 641 S.W.2d 54 (Mo. 1982) (en banc).
249. The trial judge acted under a court rule which authorized him, at the request of the prosecution, to order the defendant to produce material and information, in addition to what the defendant intended to introduce as evidence, if the request was reasonable and information sought was material to the prosecutor's case. Mo. R. Crim. P. 25.05(a)(1).
250. Arguably, the waiver took place only when the defendant presented evidence in support of an insanity defense. But the plea of insanity at least bespeaks an intent to present evidence on the defense; and if the defendant presents no evidence, the prosecution has no further need of its discovery because the issue of insanity will no longer be in the case and the prosecution can rely on the presumption of sanity.
their psychiatrists and, if incarcerated before trial, must arrange with their jail wardens for scheduling pretrial mental examinations. In those cases the prosecution will have no difficulty discovering "independently" the identity of the defense psychiatrist; and there is little the defendant can do to avoid making the desired disclosure. Formal discovery rules simply require wealthy defendants to do the same thing.

The disclosure required of defendants who raise an insanity or related defense therefore need not be limited to the evidence they intend to produce at trial. By putting in issue their mental condition defendants waive any physician-patient privilege applicable to prior communications to treating physicians.\textsuperscript{251} They are no longer able to insist on the privacy of those relationships;\textsuperscript{252} and the prosecution may contact those physicians and use them as witnesses. A growing body of case law also permits the prosecution to do the same thing with respect to nontreating physicians retained by defense counsel to examine the defendant. In neither case should the privilege against self-incrimination bar prosecutorial discovery of the physicians and their reports, although the authority to support this last proposition is not as clear as it might be with respect to the discovery of treating or examining physicians unknown to the prosecution.

The work product privilege also should not bar prosecutorial discovery of the identity and reports of examining psychiatrists, but the result may be different for the reports of other experts retained by the defense. The report and trial testimony of a defense-retained psychiatrist is in many if not most cases unique. The prosecution cannot duplicate it by retaining its own expert or a neutral expert. Even if the prosecution obtains a court order for a mental examination of the defendant, the defendant may not be as cooperative with the court-appointed psychiatrist as he was with the defense psychiatrist; and, if the examination by the defense psychiatrist preceded the court-ordered examination, as is likely to be the case, the defense psychiatrist will have had access to information unavailable to subsequent examiners who will encounter a mind more removed in time from the crime and affected, if not primed, by the earlier examination. The case for prosecutorial discovery thus depends in large part on the uniqueness of the defense psychiatrist's report. If it were not unique, and the prosecution could simply duplicate it, then the unused defense expert should constitute protected work product. The Federal Rules of Civil Procedure, for example, permit discovery of a


\textsuperscript{252} Saltzburg, \textit{supra} note 243, at 634.
party’s unused experts only in “exceptional circumstances.” The philosophy of the rules is that the opposing party does not need discovery to prepare to cross-examine the nonappearing expert and should employ its own expert rather than use its adversary’s.

This same work product protection should normally apply in criminal cases. Thus, the prosecution should not be able to obtain discovery of the report of a handwriting analyst retained by the defendant, but not called because the expert had concluded that the offender’s and the defendant’s handwriting were the same. At least if both exemplars are still available, the prosecution should retain its own expert. The prosecution therefore does not have the same need to discover the report of the defense handwriting expert as it does the report of the defense psychiatrist. Work product protection for the unused defense handwriting expert therefore seems appropriate even at trial. The prosecution can adequately test defense evidence by cross-examining the defendant’s expert and by retaining its own expert to repeat the test.

Considering that the work product doctrine is subject to legislative and judicial modification, one might ask why a state could not change the rules to require defendants who present the testimony of a handwriting expert to disclose what other handwriting experts they have retained. The work product doctrine protects the lawyer and not the client. It is hard to fathom how depriving counsel of that litigation advantage renders counsel ineffective. Perhaps, however, defendants may claim their own privilege against self-incrimination when asked to produce an unused handwriting expert’s report because the prosecution does not need the defendant’s help (that is, the implied statement that here is a handwriting expert who may help you destroy my evidence) in order adequately to test the evidence presented.

Conclusion

Prosecutorial discovery of defense information in addition to what the defendant intends to present at trial therefore appears to be leg-

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254. Mingo v. State, 77 N.J. 576, 392 A.2d 590 (1978). Mingo also held that prosecutorial discovery of the defendant’s unused handwriting expert violated the defendant’s right to the effective assistance of counsel. The court found that violation, as well as the work product violation, to be harmless error.
gitimate, although it remains unclear how far one can generalize from the availability of such discovery in the four areas described above. To permit further development, states might consider adopting a court rule authorizing the prosecution to request discovery of specific information needed to test evidence which the defendant has chosen to present. When the prosecution requests discovery under such a rule, the court must ensure that the defendant has access to reciprocal discovery as required by due process. The reciprocity requirement may bar this broadened prosecutorial discovery unless defendants may obtain the discovery they need adequately to test the prosecution's evidence. Thus, it does not seem sufficient that court rules require, as is often the case, that the prosecution disclose its evidence plus any exculpatory material. The rules should also require the prosecution to disclose the identity of all persons with knowledge of relevant facts and all relevant documents and tangible things. In other words, the prosecutor's "factual" file must be open to the defense. The prosecutor's due process obligation to disclose exculpatory material is no substitute for this broadened defense discovery because at the pretrial stage the prosecutor has no way of reliably knowing what unused information in the file might be exculpatory, much less what information might assist the defendant to test the prosecution's evidence.

THE CASE FOR BROADER PROSECUTORIAL DISCOVERY OF DOCUMENTS AND TANGIBLE THINGS TO STRENGTHEN THE PROSECUTION'S CASE

Prosecutorial Discovery Without Formal Discovery Rules

Most prosecutorial discovery occurs, as it should, before the commencement of any adversary judicial proceeding. The prosecution, unlike a private litigant, enjoys coercive investigatory powers which permit it to gather evidence in advance of filing suit. The most important of these powers is the making of reasonable searches and seizures to obtain evidence of a suspect's guilt. The prosecution also normally has access to grand jury or other investigatory subpoenas for compelling testimony and the production of documents or tangible things.

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256. See discussion of Mo. R. CRIM. P. 25.05(a)(1) supra note 244.
257. See, e.g., Md. R. 4-263. Court rules often permit in addition defense discovery of all items in the possession of the prosecution which belong to the defendant — evidently on the theory that the prosecution's possession of these items would otherwise render them inaccessible to the defendant. Id. R. 4-263(b)(6) (defense discovery of all property of defendant in possession of state); Fed. R. CRIM. P. 16(a)(1)(C)(same).
258. See, e.g., Fla. R. CRIM. P. 3.200(A)(i) (defense discovery of all persons with knowledge of relevant facts).
The rights guaranteed all persons by the fourth and fifth amendments limit the prosecution's precharge investigatory powers. For many searches (for example, searches of dwellings or containers and searches for conversations), the prosecution must convince a neutral and detached magistrate that it has sufficient cause, normally probable cause, to justify the intrusion.\(^{260}\) The warrant issued by the magistrate must particularly describe the place or person to be searched and the things to be seized.\(^{261}\)

The requirements of probable cause and particularity do not apply — at least with the same vigor — to investigatory subpoenas. The prosecution need only establish that the demand of the grand jury or other investigatory authority for documents or tangible things is a reasonable one.\(^{262}\) While the investigatory subpoena, unlike a warrant, escapes most fourth amendment limitations, grand juries and other investigatory bodies cannot compel incriminating testimony, including acts of testimonial production, from witnesses appearing before them.\(^{263}\)

The fifth amendment privilege against self-incrimination, on the other hand, does not preclude an investigatory seizure of testimonial evidence (for example, a suspect's papers\(^{264}\) or verbal utterances\(^{265}\)), so long as the prosecution does not compel the suspect to write or say anything. The fifth amendment poses no barrier to the otherwise lawful seizure of incriminating records, including records in the suspect's own handwriting, because the officers executing the seizure do all the work themselves without any help from the suspect. Thus, in the case of a seizure, as opposed to that of a subpoena, there is no compelled act of testimonial production because "the individual against whom the search is directed is not required to aid in the discovery, production, or authentication of incriminating


\(^{261}\) U.S. Const. amend. IV.


\(^{264}\) Andresen v. Maryland, 427 U.S. 463 (1976); see also United States v. Bennett, 409 F.2d 888 (2d Cir. 1969) (Friendly, J.) (seizure of personal diary upheld).

evidence." To obtain a warrant to search for and seize evidence, the prosecution must describe with particularity the things to be seized and establish that it is probable that the things are connected with criminal activity and are to be found in the place to be searched. With respect to the particularity of the description, courts are lenient and require little more than the police do the best they can in describing the items to be seized. The nexus requirement also poses few practical problems once the police connect the possessor of the "thing to be seized" with a crime.

The location requirement, on the other hand, serves as a significant barrier to a successful search even in those cases where the police have identified or arrested a suspected offender. Any probable cause the police have with respect to the location of the thing may quickly become stale. As a practical matter, a suspect seeking to avoid detection is likely to keep incriminating items in places where law enforcement authorities would least expect to find them. Thus, a warrant authorizing the search of more likely locations may not lead to the seizure of incriminating evidence. It is nevertheless simply not reasonable to permit the police to search every place to which the suspect has had access since the time of the crime.

The prosecution often seeks to overcome the uncertainty of the location of seizable evidence by obtaining a subpoena compelling production of the evidence by the person believed to be in possession. Of course, subpoenas directed to the suspect under investigation may prompt a claim of privilege. Fisher has spawned considerable confusion in the lower courts on what acts of testimonial production the privilege protects. Professor Heidt has argued that the courts should interpret Fisher to bar only "rocking-chair" subpoenas ordering the production of contraband or stolen goods. In these situations, the production of the thing subpoenaed is an implied admission of an element of an offense (that is, the possession of contraband or

266. Andresen, 427 U.S. at 474.
268. 2 W. LaFave, Search & Seizure § 4.6 (1978 & 1985 Supp.) (collecting cases). In Andresen itself, the Court upheld a warrant which, after listing numerous specific items, contained a catch-all phrase authorizing the seizure of "all other fruits, instrumentalities, and evidence" of the false pretenses offense under investigation. The Court noted that the offense involved a complex real estate scheme which the state could prove only by piecing together "many pieces of evidence that, taken singly, would show comparatively little." Andresen, 427 U.S. at 281 n.10. It was therefore not reasonable to expect the prosecution to describe in advance each little piece of evidence it needed.
269. See, e.g., Sgro v. United States, 287 U.S. 206 (1932) (no probable cause to search hotel for intoxicants when affidavit established their presence three weeks earlier).
272. Id. at 489-91.
stolen goods). Professor Heidt argues that in all other situations compelling from the subpoena recipient implied admissions on the existence, possession and authenticity of documents and tangible things does not sufficiently aid the prosecution to offend the policies behind the privilege of maintaining a fair state-individual balance and of protecting human dignity. This analysis is questionable because, as the courts recognize, there are situations where a suspect’s admission of the noncriminal possession of a document or weapon may be very useful to the prosecution, although not in itself sufficient, in establishing an element of an offense (for example, knowledge of fraud disclosed in a document or access to a weapon used in a crime).

Prosecutors have had greater success with subpoenas directed at nonsuspects. The privilege against self-incrimination is personal; and the recipient of a subpoena cannot claim that production of the items requested would incriminate someone else. Still more important, persons who fear incrimination cannot intervene or otherwise prevent the recipient from producing the documents or things subpoenaed, even if they own the items and the producer holds them as their agent. Thus, offenders who allow others to exercise control over incriminating evidence cannot complain if the prosecution compels those nonsuspects to produce it. Suspects can only complain about compulsion directed at themselves.

One exception to this generalization — an exception not based on the fifth amendment privilege — protects documents, and perhaps tangible things, entrusted to an attorney for the purpose of obtaining legal advice. Fisher held that, although the suspect’s attorney could not raise the client’s fifth amendment privilege as the privilege was personal to the client, counsel could, and indeed must, raise the attorney-client privilege to refuse the production of documents that the client could refuse to produce if the client had retained possession of them. The Court reasoned that the client would not make full

273. *Id.* at 489.
274. *See, e.g., In re Grand Jury Subpoena Duces Tecum,* 722 F.2d 981 (2d Cir. 1983) (implied admission of possession helps prosecution establish guilty knowledge of possessor).
275. For a similar analysis of testimonial production, see *Organizational Papers and the Privilege Against Self-Incrimination,* 99 *Harv. L. Rev.* 640, 646 n.46, 650 n.68 (1986).
277. *Id.* (taxpayer cannot stop his accountant from producing taxpayer’s records); Perlman *v.* United States, 247 U.S. 7 (1918).
disclosure by entrusting privileged documents to the attorney if by so doing the documents became available to the government.\textsuperscript{279} Fisher thus protects from discovery documents in the possession of the attorney if the government could not have compelled the client to produce them and if the client transferred them to the attorney for the purpose of obtaining legal advice. The basis for this protection, however, is the federal common law attorney-client privilege\textsuperscript{280} and not the client's constitutional privilege against self-incrimination. The states and Congress, as well as the Supreme Court in its rule-making capacity, may choose to define the attorney-client privilege more narrowly so as not to protect documents or other physical evidence transferred to the attorney.\textsuperscript{281}

State courts, like the Fisher Court, have treated the attorney-client privilege as a limitation on prosecutorial discovery from defense counsel. Unlike Fisher, state courts have not interpreted the privilege to protect physical evidence received by the attorney from the client.\textsuperscript{282} This limitation on the privilege has, unfortunately, received less popular attention than a related, expansive interpretation which requires the attorney to suppress information detrimental to the client. Under that interpretation, the privilege covers not only confidential communications from the client to the attorney on the location of incriminating evidence, but also information acquired by the attorney or a defense investigator directly as a result of those communications.\textsuperscript{283}

\textsuperscript{279} Id. at 403.

\textsuperscript{280} FED. R. EVID. 501 provides that privileges in the federal courts "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." The Court plainly decided Fisher (a federal case) under that rule.

\textsuperscript{281} Beckler v. Superior Court, 568 F.2d 661, 662 (9th Cir. 1978) (California courts may reject Fisher holding on attorney-client privilege).

\textsuperscript{282} See infra text accompanying notes 288-306.

\textsuperscript{283} MCCORMICK ON EVIDENCE, supra note 62, § 89; People v. Meredith, 29 Cal. 3d 682, 631 P.2d 46, 175 Cal. Rptr. 612 (1981); State v. Douglass, 20 W. Va. 770 (1882). The privilege, for example, protects not only the client's admission that he murdered A and buried the body in location B, but also the attorney's personal observation of the burial site confirming those admissions. People v. Belge, 83 Misc. 2d 186, 372 N.Y.S.2d 798, aff'd, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (1975) (Lake Pleasant bodies case). This extension of the privilege to cover the observations of the attorney has provoked considerable controversy — as demonstrated by the public debate following the client's (not the attorneys') eventual disclosing of the location of the bodies in the Lake Pleasant case. The Belge court itself, while holding that the attorney-client privilege shielded the attorneys from liability under the Public Health Law for failing to properly bury the bodies, did indicate in dicta that the result might have been different if the state had asserted less "trivial" interests and charged the attorneys with obstructing justice. 83 Misc. 2d at 191, 372 N.Y.S.2d at 803.

Professor Saltzburg has argued more generally that the privilege should not cover counsel's observations — including observations of evidence shown in confidence by the client. He argues that the attorney should be available to the prosecution as a witness if no other witness (excluding of course the defendant) can provide that testimony. The
This expansive interpretation of the privilege only protects communications from the client; and it is now clear that if a third party presents incriminating evidence to the attorney (for example, the client's weapon or bloody clothes), the attorney must either advise the third party to present the evidence to the prosecution or, if the attorney takes delivery of the evidence, must turn it over to the prosecution within a reasonable period of time. The attorney must do the same if a defense investigator takes possession of incriminating evidence discovered by the investigator. Accepting and keeping the evidence without disclosing it is unethical and may violate criminal statutes punishing the obstruction of justice. Lawyers have in fact become quite sensitive about the ethical obligations imposed on the receipt of incriminating evidence, and many believe that the safest course is simply to refuse to accept it. Unfortunately, that solution is not always appropriate because at the time the evidence becomes available defense counsel may not know whether the evidence might be useful in some way in preparing the defense. More importantly, if defense counsel does not accept it, the evidence may be destroyed to the detriment of the defendant.

The situation is only slightly different if the client presents evidenc-
tiary items to the attorney. In the lead case of *State ex rel. Sowers v. Olwell*, 289 a coroner subpoenaed an attorney representing a murder defendant to produce all knives in his possession "relating to" the client. The attorney refused to comply on the ground that any knives in his possession he had received in confidence from the client. The *Olwell* court reversed the attorney's contempt conviction because it found that the subpoena required "the attorney to give testimony concerning information received by him from his client in the course of their conferences." 290 Thus, although the *Olwell* court did not say it quite so clearly, the coroner could not compel the attorney to testify as to the client's communication to him that "here is my knife." 291 The attorney-client privilege therefore prevailed, in the court's opinion, "against the public's interest in the criminal investigation process." 292

The *Olwell* court recognized, however, that the attorney-client privilege did not protect the knife itself, 293 and did not permit the attorney to withhold it permanently. Even if the client gave the attorney the knife to obtain legal advice and not just to take it out of circulation, the attorney could only retain it for a "reasonable period of time" (presumably the time needed to do any testing or investigation indicated by the circumstances) and then must on his own motion turn it over to the prosecution. 294 The *Olwell* court rather loosely based the attorney's duty to disclose on his status as an "officer of the court." 295 It would seem preferable to hold that the attorney's permanently taking the knife out of circulation would constitute an obstruction of justice. 296 The attorney's failure to disclose would therefore constitute a crime, thus imposing on the attorney an

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289. 64 Wash. 2d 828, 394 P.2d 681 (1964).
290. *Id.* at 833, 394 P.2d at 684.
291. When the client transferred the knife to the attorney, the communication that "here is my knife" implicitly occurred. Subpoenaing the attorney to produce the client's knife would in effect require him to disclose that communication because presumably he knew the knife was his client's knife because his client had told him so. As stated by the Michigan Court of Appeals, permitting the prosecution to show that the defendant's attorney had such evidence in his possession impermissibly "invites the jury to infer that defendant gave the evidence to her attorney." *People v. Nash*, 110 Mich. App. 428, 447, 313 N.W.2d 307, 314 (1981).
292. *Olwell*, 64 Wash. 2d at 832, 394 P.2d at 684.
294. *Olwell*, 64 Wash. 2d at 834, 394 P.2d at 684.
295. *Id.* at 833, 394 P.2d at 684.
296. *See the Morrell* court analysis discussed *supra* note 287.
ethical obligation to disclose.\textsuperscript{297}

The \textit{Olwell} court concluded that, once the prosecution obtained the knife, it could use it to secure a conviction of the defendant. In dicta, the court warned the prosecutor not to disclose to the factfinder the “source” of the evidence.\textsuperscript{298} Informing the jury of the attorney’s production of the knife would in effect ask them to infer that the knife came from the defendant.\textsuperscript{299} The limited exclusionary rule fashioned by the \textit{Olwell} court thus protects the defendant’s attorney-client privilege by barring the use at trial of any privileged communication.

Authenticating the knife without the defendant’s help may prove to be a difficult task.\textsuperscript{300} The prosecution therefore receives less benefit from the knife when produced by defense counsel than if the prosecution had obtained the knife by seizure from the defendant’s person or home.\textsuperscript{301} The concern that a criminal defendant might “launder” incriminating evidence by delivering it to the prosecutor with the help of counsel, thus making it less useful to the prosecution, has persuaded Professor Saltzburg to oppose the limited exclusionary rule fashioned by the \textit{Olwell} court.\textsuperscript{302} His proposed remedy of allowing the prosecutor to disclose to the jury the source of the evidence seems unwarranted. Encouraging or permitting laundering is acceptable because it gives the prosecution some evidence when otherwise it might obtain none. Ordinarily the prosecution will have had some time span during which the evidence was subject to seizure from defendant’s possession before defense counsel obtained custody of it; and the defendant was able to give it to defense counsel only because the prosecution was unable to obtain it by seizure. In addi-

\textsuperscript{297} See \textit{Model Code of Professional Responsibility} EC 7-27 (1970) (attorney shall not suppress evidence he is legally obligated to reveal).
\textsuperscript{298} \textit{Olwell}, 64 Wash. 2d at 834, 394 P.2d at 685. What the court evidently meant to say is that the prosecution must authenticate the knife as the defendant’s knife other than through the defendant’s communication of that fact to his attorney.
\textsuperscript{299} \textit{Nash}, 110 Mich. App. at 447, 313 N.W.2d at 314 (following \textit{Olwell}).
\textsuperscript{300} For a case where the prosecution was able to authenticate a weapon, see United States \textit{v. Authement}, 607 F.2d 1129 (5th Cir. 1979) (in response to subpoena defense counsel produced the defendant’s brass knuckles which other witnesses authenticated).
\textsuperscript{301} In \textit{Hitch}, 146 Ariz. at 595, 708 P.2d at 79, the court fashioned a similar rule precluding any mention to the jury of the fact that defendant’s counsel was the source of incriminating evidence. In that case defense counsel did not obtain the evidence from his client. The basis for the exclusionary rule was not the protection of the privileged communication but the protection of defendant’s right to counsel of his choice (i.e., to prevent counsel’s disqualification through his testifying against his client).
tion, the defendant's main concern in transferring incriminating evidence to counsel may not be to launder the evidence—it would be far sharper to destroy it—but to see if counsel might use the evidence to provide a defense or at least to mitigate guilt. It is too high a price to exact from the defendant's confiding in counsel to permit the prosecution not only to use the evidence against the defendant but also to use the defendant's communications to counsel about the evidence.

Other state courts have followed Olwell in requiring defense counsel to afford discovery to the prosecution of incriminating evidence furnished by the defendant. Even Fisher cited Olwell approvingly, albeit for an uncontroversial point that Olwell did not even address. The reconciliation of these state cases and Fisher is nevertheless not an easy matter. Olwell seems to present a classic fact pattern of evidence which the fifth amendment privilege protects the client from producing and which the attorney-client privilege, as construed in Fisher, prevents the attorney from producing after the client transfers the evidence to the attorney for the purpose of obtaining legal advice. Commonwealth v. Hughes squarely held that the privilege barred compelling a defendant to produce a weapon suspected to be the weapon used to commit the offense charged. Yet Olwell and its progeny hold that the attorney-client privilege does not bar counsel from producing the weapon and thus afford useful discovery to the state.

The most likely explanation for this seeming discrepancy—if one tries to reconcile the cases rather than simply conclude that state courts have interpreted the state-law attorney-client privilege to be narrower than the federal one—is that the subpoena in Fisher required the attorney to produce the documents which the taxpayer had given him. The subpoena was therefore similar to the subpoena condemned in Olwell because it in effect required the attorney to produce the knife given him by the client. Fisher, unlike Olwell, simply did not address whether the privilege protected the documents themselves (that is, whether the government could obtain them by otherwise describing them in the subpoena or by seizing

304. Fisher, 425 U.S. at 404. Fisher cited Olwell for the proposition that preexisting documents obtainable from the client when the client was in possession are also obtainable from the attorney after transfer. Olwell plainly does not support or even mention that proposition. It is doubtful that any of the Justices read the Washington Supreme Court's opinion.
them under a warrant or whether it would be permissible to impose on counsel a duty to turn them over to the government).

Perhaps Fisher did not address these issues because Fisher involved documents rather than physical evidence. The Olwell court had expressed concern about an attorney becoming "a depository for criminal evidence (such as a knife, other weapons, stolen property, etc.), -- which in itself has little, if any, material value for the purposes of aiding counsel in the preparation of the defense of his client's case."307 Documents do not fit that description; and lawyers plainly feel more comfortable accepting their clients' incriminating documents than accepting incriminating physical evidence. Perhaps the explanation for this phenomenon is that there is a far greater danger of subterfuge when incriminating physical evidence is involved.308 Rarely will there be a genuine need for the lawyer to have access to the evidence to prepare for trial. In white collar criminal cases, on the other hand, it is commonplace for defense counsel — both pre- and postcharge — to review, for purposes of preparing a defense, documents submitted by the client. Thus, it remains unclear whether Olwell's dicta on the attorney's duty to produce evidence obtained from the client applies to documents; but it is reasonably clear that Fisher's interpretation of the attorney-client privilege should not bar the federal courts from requiring what Olwell required (that is, the attorney's production of a weapon or other physical evidence obtained from the client).

A Proposed Discovery Rule

Present law, as described in the prior section, already affords the prosecution considerable discovery from the defendant and defense counsel of documents or tangible things useful to the prosecution's case. This discovery does not take place under formal discovery rules but has as its basis the coercive investigatory power of the state and the ethical obligations of defense counsel. This limited discovery does not help the prosecution in cases like Commonwealth v. Hughes where the defendant, rather than confiding with counsel incriminating evidence which the state has a right to seize, keeps or conceals it where the prosecution cannot find it. When discussing Hughes, it was argued that the prosecution should be able through discovery to

307. Olwell, 64 Wash. 2d at 833. 394 P.2d at 684.
308. See In re Ryder, 263 F. Supp. 360 (E.D. Va. 1967) (a well-known case in which the court disciplined an attorney for retaining a shotgun and stolen goods received from his client).
enforce its right of access to Hughes's weapon so long as the prosecution did not use any testimony compelled from Hughes.  *Olwell* and its progeny, as well as the growing body of law on use immunity, suggests how that might be accomplished.

The proposed mechanism is a court rule authorizing prosecutorial discovery from the defendant of documents or tangible things if the prosecution (i) specifically requests their production; (ii) describes the documents or things with sufficient particularity to satisfy fourth amendment requirements; and (iii) establishes probable cause to connect the documents or things to the crime charged. The rule would apply only to evidentiary items and not to items such as contraband or stolen goods whose possession is an element of the crime charged. In addition, the rule would prohibit the prosecution from disclosing to the jury or other fact-finder the source of the evidence produced.

This limitation on the use of the defendant's act of production, in addition to protecting the defendant's privilege against self-incrimination, should deter prosecutorial overreliance on postcharge discovery to bolster an otherwise weak case. The prosecution should obtain incriminating evidence by precharge search and seizure whenever possible. The proposed rule provides the prosecution an incentive to do so because seized evidence is more useful. The seizure serves to authenticate the evidence and may connect it with the defendant. Similarly, the proposed rule does not permit the prosecution to rely on postcharge discovery to obtain evidence as crucial as contraband or stolen goods.

Because there is no precedent for this rule, its constitutionality is of course open to question. The chief basis for constitutional attack is the defendant's privilege against self-incrimination. The basic argument for the rule's constitutionality is that the rule does not violate the policies behind the privilege by skewing the criminal process in the prosecution's favor or by permitting the prosecution unfairly use the defendant in securing a conviction. In fact, the rule helps the prosecution to rectify an imbalance in the defendant's favor.

The proposed discovery rule allows the state to enforce its right of access against defendants who have succeeded in concealing from the state evidence which the state has a right to seize. The help given the state by the defendant is slight: defendants must afford the prosecution access to seizable evidence rather than continue to keep hidden what they know the prosecution is seeking. The aid for the prosecution's case comes primarily from the evidence itself and not the defendant's production of it. It is hard to see how compelling the defendant to make seizable evidence accessible to the prosecution adversely impacts a fair state-individual balance or violates human dignity any more than compelling a defendant to produce a blood
sample or voice or handwriting exemplars.

Of course, the proposed rule does compel a potentially incriminating communication from the defendant. If the defendant has the item sought in the prosecution's discovery request, the defendant must testify: "I have the item of evidence you wish. Here it is." Thus, while only the common-law attorney-client privilege protects the client's admissions to his counsel, including an admission that "Here is my gun," the constitutional privilege against self-incrimination applies directly when the prosecution compels this form of discovery from the defendant.

The appropriate protection, however, is the same in both situations (that is, to bar any prosecutorial use of privileged communications). The Court has upheld the compulsion of incriminating testimony upon a grant of use immunity shielding the defendant from any use or derivative use of the compelled testimony.\(^3\)\(^0\)\(^9\) In the context of compelled acts of testimonial production, the Court has made it crystal clear that the incriminating contents of the documents or things produced do not fall within the scope of the compelled testimony.\(^3\)\(^1\)\(^0\)\(^9\) The compelled testimony, which the state must immunize if it is incriminating, are the implied admissions by the producer on existence, possession and authenticity.\(^3\)\(^1\)\(^1\)\(^0\)\(^9\) Barring the prosecutor from making any reference to the source that produced the document or thing will effectively immunize that testimony. Of course, use immunity bars derivative as well as direct uses of immunized testimony,\(^3\)\(^1\)\(^2\) \(^3\)\(^1\)\(^3\) and the prosecution may need to show that it did not use any acts of testimonial production as leads to secure other evidence. While this task of negating any derivative use is often a difficult one when the immunized testimony occurs before trial and covers a broad range of topics, it should prove less difficult when the immunized testimony is very narrow and occurs after the prosecution has prepared its own case.\(^3\)\(^1\)\(^3\)

\(^3\)\(^0\)\(^9\) Kastigar v. United States, 406 U.S. 441 (1972).
\(^3\)\(^1\)\(^1\)\(^0\)\(^9\) In Doe, the Court flatly rejected the argument that any grant of use immunity must cover the contents of the documents as well as the act of production. The Court responded that, since the privilege extended only to the act of production, "any grant of use immunity need only protect respondent from the self-incrimination that might accompany the act of producing his business records." Id. at 617 n.17 (1984).
\(^3\)\(^1\)\(^2\) Kastigar, 406 U.S. at 453.
\(^3\)\(^1\)\(^3\) Professor Subin's contrary argument that the prosecution's use of the contents of the documents or physical evidence produced is a forbidden derivative use of compelled testimony is difficult to accept in light of Doe's footnote 17 — an authority not cited by Professor Subin in his otherwise excellent article. See Subin, The Lawyer as
The effect of the proposed rule on attorney-client relations is also an open question. At present, counsel should warn clients, before accepting possession of physical evidence, that it may be necessary to disclose the evidence to the prosecution. Under the proposed rule, defense counsel must instruct clients that, if the client becomes or is a criminal defendant, the client has a duty to produce documents or physical evidence in their possession or control if that evidence falls within the provisions of the rule. Counsel's policing of the client's obligation to produce evidence will certainly produce some tension in the relationship, but not nearly so much tension as created by counsel's ethical obligation to prevent client perjury. If counsel believes that a client is concealing documents or tangible things in defiance of a discovery order, counsel must seek to persuade the client to comply with the law or, if unable to do so, withdraw from the case. Unlike in the case of perjured testimony, the above conflict is likely to arise before trial at a time when counsel can withdraw from the case without disclosing to the trial judge the basis for withdrawal.

The chief objection to the proposed rule may in fact be its limited impact. It must be admitted that there is an element of unreality in the rule's assumption that criminal defendants will meekly produce evidence that the prosecution will then use to convict them. Defendants may respond to discovery requests by denying that they possess or control the requested evidence. Some, if not most, criminal defendants will lie both to their counsel and the court, even though the latter misrepresentation may subject them to the penalties of perjury or false statement.

Despite the limited efficacy of the rule and its potential for generating attorney-client conflict, the proposed rule does present a major advantage by refocusing the debate on defense suppression of evidence. So far, the debate has focused on the ethical obligations of counsel. The question asked is when must counsel squeal on the client by disclosing documents or tangible things helpful to the prosecution. The response given is that attorneys must squeal only if they take possession of physical evidence. Such a response naturally discourages receipt of evidence even if it also may be useful to the de-
fense. The proposed rule answers a different, more relevant question: what are the constitutional limits for imposing discovery obligations directly on the defendant. The question is more relevant because, if we want to afford the prosecution access to incriminating evidence, we should not expect defense counsel to squeal, but should expect the defendant-client to produce it. In other words, the preferable response to the danger of suppression of evidence is not to impose ethical obligations on defense counsel but to impose discovery obligations on the defendant. Defense counsel will then have an ethical obligation to enforce discovery orders. 317 Such an approach allows counsel to tell the client what the law requires the client to do and should produce a healthier attorney-client relationship in the long run.
